Supreme Court, U.S.
FILED
MAR 16 2007
OFFICE OF THE CLERK

No. 06-1269

IN THE

Supreme Court of the United States

UNITED STATES EX REL. CHARLOTTE BLY-MAGEE,
Petitioner,

v.

BRENDA PREMO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the "public disclosure bar" of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A), a court generally may not hear a *qui tam* action based on "the public disclosure of allegations or transactions . . . in a congressional, administrative, or [GAO] report, hearing, audit, or investigation." Does the phrase "administrative . . . report, hearing, audit, or investigation" encompass disclosures by *state and local* governments, as determined by three federal courts of appeals, or does it refer to disclosures only by the federal government, as held by the Third Circuit?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner was the plaintiff in the district court and the appellant in the court of appeals.

Respondents Brenda Premo, Catherine Campisi, Melinda Wilson, Warren Hayes, Lara Fraser, Los Angeles County Department of Mental Health, and Los Angeles County Office of Education were defendants in the district court and appellees in the court of appeals.

The named individuals, all employees of the California Department of Rehabilitation ("CDR"), are collectively referred to as the "State" respondents. The two Los Angeles agencies are referred to as the "County" respondents.

Five other CDR employees — Jim Kay, Keith Foster, Edna Larsen, Kenneth Smedberg, and Verne Albright — were named in the complaint but they retired before they could be served and thus did not appear in this action.

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Charlotte Bly-Magee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case involves an issue of recurring significance to the proper administration of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, the statute that provides a remedy for frauds against the United States Treasury. Under the FCA, an action brought by a relator on behalf of the United States is jurisdictionally barred if there is a "public disclosure" of certain information underlying the relator's claims unless the relator is found to be an original source of the information. The purpose of the bar is to prevent relators from bringing parasitic lawsuits based on information readily available to the United States government. But because of the harshness of that bar — and the consequent deleterious effect of preventing a recovery by the United States for frauds committed against the public fisc — Congress carefully limited the types of public disclosures giving rise to the bar. As relevant here, the categories of public disclosures set forth in the FCA must be "of allegations or transactions . . . in a congressional, administrative, or [GAO[1]] report, hearing, audit, or investigation." 31 U.S.C. § 3730(e)(4)(A).

In holding that the word "administrative" in the foregoing provision may include a state or local report, hearing, audit, or investigation, the Ninth Circuit joined the Eighth and Eleventh Circuits in an acknowledged conflict with the Third Circuit, which approximately one month after the decision below reaffirmed its longstanding precedent that the word "administrative" refers only to such documents from the *federal* government. There is thus no reasonable prospect that this circuit conflict will be resolved without this Court's review.

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[1] The statute mistakenly refers to the General Accounting Office, now the Government Accountability Office, as the "Government Accounting Office." 31 U.S.C. § 3730(e)(4)(A). For simplicity, the abbreviation "GAO" is used here.

The question is important to the United States Treasury, because the majority interpretation of § 3730(e)(4)(A) creates a jurisdictional bar to claims where there has been a public disclosure in a document that would *not* necessarily be known to federal agents. That rule defies common sense and conflicts with the history of the FCA, which demonstrates that Congress enacted the public disclosure bar to stop parasitic suits by relators who based their suits on information already known to the federal government. Because the question presented arises commonly in FCA litigation, particularly in an era of large federal-state reimbursement programs such as Medicare and Medicaid, certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 470 F.3d 914. The relevant orders of the district court (Pet. App. 10a-28a) are not reported.

JURISDICTION

The court of appeals entered its judgment on December 13, 2006. A petition for rehearing was denied on January 11, 2007. Pet. App. 29a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The "public disclosure bar" of the False Claims Act ("FCA"), 31 U.S.C. § 3730(e)(4)(A), provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Other relevant provisions of the FCA, 31 U.S.C. §§ 3729-3733, are reprinted at Pet. App. 30a-39a.

STATEMENT

A. Factual Context

This is a *qui tam* action brought under the FCA by petitioner Charlotte Bly-Magee, the former executive director of Southern California Rehabilitation Services ("SCRS"), a non-profit organization that provides services to individuals with disabilities. Petitioner complains that the California Department of Rehabilitation ("CDR") and its employees defrauded the federal government from fiscal years 1995-1996 through 1999-2000.

The Rehabilitation Act, 29 U.S.C. §§ 701-796*l*, provides federal funding to support vocational rehabilitation programs to assist disabled individuals in preparing for and obtaining employment. *See id.* § 720. CDR is the California state agency that administers the state's Vocational Rehabilitation Program and disburses federal funds for that purpose. When disbursing federal funds, CDR must comply with a series of federal statutes and regulations. CDR's employees, including the State respondents, violated those federal procurement regulations in awarding contracts to local governments and school districts.[2] The end result was that the federal government financed state programs that were not entitled to funding under the Act. The State respondents then falsely certified compliance with federal procurement and auditing regulations under the Act.

The fraudulent scheme caused the federal government to pay for services at inflated rates and to purchase duplicative services. It also substantially reduced the effectiveness of CDR and the Rehabilitation Act in helping California's disabled citizens.

Petitioner first learned of the fraud while serving as executive director of SCRS. After leaving her paid position with SCRS in 1991, petitioner continued to be actively

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[2] In the current procedural posture, the factual allegations in petitioner's complaint must be taken as true. *See* Pet. App. 15a; State Defendants'/Appellees' C.A. Br. 13-14.

involved with its Board of Directors and continued to write proposals for the organization. Petitioner's allegations of fraud in the present action stem from her ongoing investigation into CDR's practices.

In February 2000, the California State Auditor, in response to a state legislative commi tee's request under state law, issued an audit report describing deficiencies in CDR's administration of the Vocational Rehabilitation Program. The state audit report was transmitted to the Governor of California, the President Pro Tempore of the State Senate, and the Speaker of the California Assembly. At some point, the report was also posted on the Internet at the home page of the Bureau of State Audits.[3]

In relevant part, the state audit report contained a section entitled "The Requirement that California Work with Local Agencies has Generally Led to Higher Costs per Case," which commented that, "[t]hough not required, [CDR] has established cooperative agreements with local agencies to provide vocational rehabilitation services to clients that they mutually serve." In a written response accompanying the report, respondent Catherine Campisi, CDR's director, explained that CDR had "elected to enter cooperative arrangements with local public agencies where they furnish part or all of the required non-federal matching funds . . . enabl[ing] the department to draw down substantial federal funds that would have otherwise been unmatched." In the court of appeals, the State respondents argued that the "description of the CDR transactions with local agencies is very similar to [Bly-Magee's] description of the transactions and allegations forming the basis for her action." State Defendants'/Appellees' Br. 23.

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[3] Located at http://www.bsa.ca.gov/pdfs/reports/99111.pdf, the report can be found through the Bureau of State Audits' home page, http://www.bsa.ca.gov/reports/.

B. Statutory Context

The FCA generally prohibits any person from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). The FCA permits a private *qui tam* action — brought in the name of the Government by a person known as a "relator" — against a person violating that prohibition. *See id.* § 3730(b)(1).[4]

Congress first enacted the FCA in 1863 at the request of President Lincoln to combat rampant fraud in procurement during the Civil War. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 ("1863 Act"), *reenacted by* Rev. Stat. §§ 3490-3494, 5438 (1878). Under the 1863 Act, relators were permitted to bring *qui tam* suits based solely on public information, with no requirement that they contribute anything to the government's knowledge of, or ability to pursue, potential fraud. *See United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d 320, 324 (1st Cir. 1994); *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). Opportunistic relators took advantage of the 1863 Act's permissiveness by bringing "parasitic" suits "in which the relator sued upon information copied from government files and indictments." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497 (11th Cir. 1991).

In 1943, Congress amended the FCA in response to this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which the relator was allowed to pursue a *qui tam* suit even though he brought no information of his own to the action, but merely copied the allegations from a criminal indictment. *See id.* at 545-47. In

[4] The complaint must first be served on the United States and filed under seal for 60 days. *See* 31 U.S.C. § 3730(b)(2). Within that period (including any extensions), the United States must either intervene and conduct the litigation or decline to intervene and leave the conduct of the litigation to the private relator. *See id.* § 3730(b)(2)-(4).

the 1943 Amendment, Congress imposed a "government information bar" to preclude *qui tam* suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609 ("1943 Act"). Courts strictly construed that provision, leading to a substantial decline in the number of *qui tam* suits to enforce the FCA. *See S. Prawer & Co.*, 24 F.3d at 325; *Springfield*, 14 F.3d at 650.

The Seventh Circuit's decision in *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), spurred Congress to amend the FCA again. In *Dean*, the court held that the "government information bar" precluded a *qui tam* action by the State of Wisconsin, despite the State's having uncovered the alleged fraud through its own investigation, because the information had been disclosed in a criminal trial and in newspaper stories. *See id.* at 1102-04. In response to *Dean* and other restrictive interpretations, and "in light of the belief that the Government lacked the resources to adequately address the growing problem of fraud upon the Government, Congress amended the FCA in 1986 in order to 'encourage more private enforcement suits.'" *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (quoting S. Rep. No. 99-345, at 23-24 (1986)).

The 1986 "public disclosure bar" was enacted to strike a balance between the overly restrictive "government disclosure bar" of the 1943 Act, which barred suits even by relators who have themselves investigated and reported information that the government otherwise lacked, and the overly permissive 1863 Act, which allowed opportunistic suits such as *Hess* by relators who brought nothing to the suit. *See Stinson*, 944 F.2d at 1154; H.R. Rep. No. 99-660, at 22-23 (1986); S. Rep. No. 99-345, at 4.[5]

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[5] To encourage more private enforcement suits, the 1986 Amendments also "increased monetary awards, adopted a lower burden of

The FCA's "public disclosure bar" precludes jurisdiction over *qui tam* actions based upon certain prior public disclosures of allegations or fraudulent transactions unless the suit is brought by the Attorney General or the relator is an "original source" of the information. But only certain disclosures mentioned in the statute implicate the public disclosure bar. More specifically, § 3730(e)(4)(A) enumerates three categories of sources of public disclosure that can trigger the jurisdictional bar: (i) a "criminal, civil, or administrative hearing," (ii) "a congressional, administrative, or [GAO] report, hearing, audit, or investigation," or (iii) the news media.

This case concerns the interpretation of the second category — specifically, whether an "administrative" source includes only a source prepared by the *federal* government, or whether it also encompasses "administrative" reports, audits, and investigations prepared by *state and local* governments.

C. Proceedings Below

Petitioner, alleging violations of the FCA from fiscal year 1995-1996 through fiscal year 1999-2000, brought the present action in the Central District of California, invoking the district court's jurisdiction under 28 U.S.C. § 1331 and the FCA. The district court dismissed the action under the public disclosure bar, concluding that petitioner's complaint was based upon allegations or transactions that were publicly disclosed in a previous lawsuit and that petitioner had failed to establish that she was an original source of the information.[6]

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proof, and allowed the *qui tam* plaintiff to remain a party in the action even if the Government intervenes." *Stinson*, 944 F.2d at 1154.

[6] The present action is petitioner's third *qui tam* suit against CDR and its employees, each new case being filed as petitioner learned more facts. Of the two prior cases, only the second is relevant here. In that case, petitioner made allegations that were similar to those in the present case for the period between October 1992 and June 1997. The district court dismissed that case, and the Ninth Circuit affirmed. Pet. App. 2a, 3a-4a.

On appeal, the Ninth Circuit split petitioner's claims into three parts based on the time period covered. Only the middle period is at issue here.[7] For that middle period, from June 1997 through June 1999, the court of appeals held that the state audit report publicly disclosed the allegations or transactions on which petitioner's claims were based. Pet. App. 8a-9a. It accordingly affirmed the dismissal of that portion of her complaint. *Id.* at 9a.

In reaching the conclusion that a state audit report qualifies as "a congressional, administrative, or [GAO] report [or] audit," the Ninth Circuit followed *Hays v. Hoffman*, 325 F.3d 982, 989 (8th Cir. 2003). *See* Pet. App. 5a-6a. The court of appeals also acknowledged that the Third Circuit had held in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997), that only *federal* administrative reports qualify as sources of public disclosure in § 3730(e)(4)(A)'s second category. Pet. App. 5a.

The State respondents filed a petition for rehearing, in which they were joined by the County respondents. The Ninth Circuit denied rehearing on January 11, 2007. *Id.* at 29a.

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[7] With respect to the first period, the court of appeals affirmed the dismissal of petitioner's claims arising out of fraud committed before June 1997 — and therefore coming within the period covered by her previous *qui tam* action, *see supra* note 6 — because the court viewed them as based on a disclosure from a civil hearing and it concluded that petitioner was not an original source. Pet. App. 3a-4a. With respect to the final period, the court of appeals reversed the dismissal of petitioner's claims relating to fraud committed during the 1999-2000 fiscal year because it had not been publicly disclosed in any forum. *Id.* at 9a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS AN ACKNOWLEDGED CIRCUIT CONFLICT ON THE PROPER INTERPRETATION OF THE FALSE CLAIMS ACT'S PUBLIC DISCLOSURE BAR

Four circuits and a passel of district courts sharply diverge on whether a state or local administrative report constitutes an "administrative" report under § 3730(e)(4)(A), which lists the categories of items constituting public disclosures that can bar a relator's FCA suit. After the decision below, that conflict deepened when the Third Circuit reaffirmed its conflicting — and correct — interpretation of § 3730(e)(4)(A) to preclude a state or local administrative report from falling within the public disclosure bar. The United States also formally adopted that position in a brief filed in the Eighth Circuit. By contrast, the Eighth, Ninth, and Eleventh Circuits have held that § 3730(e)(4)(A)'s second category *does* include "administrative" sources originating with *state and local* governments. Both the Eighth and Ninth Circuits expressly acknowledge the conflict. District court decisions addressing this issue in other circuits fall on both sides of that circuit split, further demonstrating the state of confusion that persists in the lower courts.

A. The Third Circuit Has A Firm And Entrenched Rule That § 3730(e)(4)(A)'s Second Category Includes "Administrative . . . Reports" Only If They Originate With The Federal Government

1. In *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997), the Third Circuit, the first court of appeals to confront this issue, ruled that § 3730(e)(4)(A)'s reference to "administrative . . . reports" includes only administrative reports that originate with the federal government. There, a Delaware County consultant brought a *qui tam* action against the County under the FCA. *Id.* at 735. The consultant alleged that the County had violated a contractual agreement with the federal government by failing to inform the Department of

Housing and Urban Development ("HUD") that it retained proceeds from the sale of land it had previously acquired using HUD funds. *Id.* at 737. The district court dismissed the consultant's complaint under the public disclosure bar, finding that the action was based solely on information or allegations that had been publicly disclosed through several sources, including a Grantee Performance Report ("GPR") prepared by Delaware County and submitted to HUD. *Id.* at 735-36. Federal law explicitly requires entities accepting HUD funds, such as the County, to submit GPRs to the federal government. *Id.* at 743 (citing 42 U.S.C. § 5304(e) (Supp. IV 1992)).

On appeal, the Third Circuit held that the public disclosure bar's prohibition of suits based on an "administrative . . . report" does not include reports produced by non-federal government sources. *Id.* at 746. In a well-reasoned opinion, the Third Circuit explained that Congress intended category two to include only reports originating with the federal government. *Id.* at 745-46. To interpret the provision, the court applied the interpretive canon of *noscitur a sociis*, which presumes that a word gathers meaning from the words around it. *Id.* at 745. The court found it implausible that Congress intended the word "administrative" to refer to both state and federal reports when the word lies sandwiched between two modifiers, "congressional" and "GAO," which are unquestionably federal in nature. *Id.* The court also noted that, if state and local government reports qualified as administrative reports under category two, local governments who commit fraud could preemptively invoke the jurisdictional bar against *qui tam* suits by submitting reports to the federal government that are sufficient to constitute disclosure under the FCA but are insufficient to actually alert the federal government to the fraud. *Id.* Finally, the court reasoned that construing "administrative . . . reports" to include state reports would essentially revive the restrictive "government knowledge" standard that was in effect before Congress enacted the 1986 Amendments. *Id.* at 745-46. That standard barred any actions based on

information that had passed into the possession of the federal government prior to the suit's filing. *Id.* The court explained that Congress enacted the 1986 Amendments to eliminate that overly restrictive standard. *Id.* Accordingly, the court concluded that "§ 3730(e)(4)(A)'s reference to 'administrative reports' [bars] only those actions based on administrative reports that originate with the federal government." *Id.* at 746.[8]

2. The Third Circuit has reaffirmed the *Dunleavy* rule in subsequent cases. In *United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*, 186 F.3d 376, 383-84 (3d Cir. 1998), the Third Circuit evaluated whether a response by HUD to a request under the Freedom of Information Act ("FOIA") qualified as an "administrative report" under category two of the public disclosure bar. Writing for the court, then-Judge Alito explained that, "[i]n *Dunleavy*, we concluded that the term 'administrative' when read with the word 'report' refers only to those administrative reports that originate with the federal government." *Id.* at 383 (internal quotation marks and citation omitted). Because the FOIA response by HUD "originated with a department of the federal government and constituted official federal government action," then-Judge Alito concluded that it "plainly satisfied *Dunleavy*'s definition of 'administrative.'" *Id.* By testing the HUD response against the *Dunleavy* definition, the Third Circuit made clear that it regards *Dunleavy* as announcing the relevant standard for the term "administrative" for purposes of the public disclosure bar.

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[8] In a subsequent decision, the Third Circuit reaffirmed that category two includes only disclosures by federal sources, even when a state or local agency independent of the entity accused of fraud prepares the report. *See United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 473 F.3d 506, 520-23 (3d Cir. 2007) (county records, which showed that defendant contractors had not recorded security instruments as required under an agreement with the Navy, were not sources of public disclosure because they were not federal, but they were relevant to the relator's original source status once the same information was publicly disclosed in federal materials).

The Third Circuit again reaffirmed the *Dunleavy* holding shortly after the decision below was announced in petitioner's case. *See Atkinson*, 473 F.3d at 520 n.21 (confirming that "a state record cannot serve as a source of publicly disclosed allegations and transactions for purposes of § 3730(e)(4)(A)"). Had the Third Circuit given any thought to realigning itself with the other circuits, it could readily have done so in the years since *Dunleavy*. The court's subsequent decisions, however, demonstrate that the *Dunleavy* rule is deeply entrenched within the Third Circuit and the court is not likely to revisit its holding in light of the contrary holdings by the Eighth, Ninth, and Eleventh Circuits.

B. The Eighth, Ninth, And Eleventh Circuits Have Interpreted § 3730(e)(4)(A)'s Second Category In Square Conflict With The Third Circuit's Holding In *Dunleavy*

1. Eighth Circuit. In *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir. 2003), the Eighth Circuit acknowledged and rejected the Third Circuit's reading of § 3730(e)(4)(A) in *Dunleavy*, holding that audit reports prepared by a state agency qualified as public disclosures within the meaning of the public disclosure bar. Hays was a former nursing home employee who was fired by his employer after sending whistleblower letters to the Minnesota Department of Human Services ("DHS"), the agency that administers Medicaid in the state. *Id.* at 986. Prompted by the letters, DHS conducted a field audit of the employer. *Id.* Hays then obtained copies of the audit report and filed a *qui tam* action against the employer. *Id.* The district court entered judgment in favor of Hays, and the employer appealed. *Id.*

On appeal, the employer claimed that the public disclosure bar precluded the employee's suit because the claims were based on matters publicly disclosed in the DHS audit. *Id.* Relying on *Dunleavy*, Hays countered that the DHS audits were not "administrative" audits or reports for purposes of § 3730(e)(4)(A) because they were not

conducted by an agency of the federal government. *Id.* at 988.

Importantly, the United States intervened specially in the appeal to support Hays on that point. Stating that the issue of whether a state audit report is an "administrative" report under § 3730(e)(4)(A) is an issue of "fundamental importance to [the] United States," the United States argued that the purpose behind interpreting "administrative" to refer only to *federal* administrative reports was that "[*f*]*ederal* fraud inquiries and their outcomes are readily available to Department of Justice attorneys as potential sources of the allegations in FCA suits brought by the government itself. Many state and local reports, audits, and investigations, however, never come to the attention of federal authorities and, accordingly, they do not put the federal government in a position to pursue on its own the fraud they disclose." Hays U.S. Br. at 37, 41, Nos. 01-3888 & 01-3891 (8th Cir. filed May 6, 2002). Holding such reports to be public disclosures would thus "undermine the balance intended by Congress in section 3730(e)(4) between encouraging private citizens to expose fraud unknown to the federal government and preventing parasitic suits by would-be relators who disclose no new information." *Id.* at 41.

Notwithstanding the United States' strong support for the relator's interpretation, the Eighth Circuit disagreed with it. "We reject the Third Circuit's textual approach," the Eighth Circuit opined, "and conclude" that state audit reports "are public disclosures within the meaning of § 3730(e)(4)(A)." 325 F.3d at 988. The Eighth Circuit attempted to distinguish its decision in *Hays* from the Third Circuit's decision in *Dunleavy*. First, the Eighth Circuit noted that in *Dunleavy* the precise entity accused of defrauding the federal government had prepared the report in question, whereas in *Hays* a state agency independent of the entity accused of fraud prepared the audit report. *Id.* at 989. But that distinction is of no consequence under the rule adopted by the Third Circuit in *Dunleavy* that

only *federal* reports can trigger the public disclosure bar. *See* 123 F.3d at 745-46.

Second, the Eighth Circuit attempted to distinguish *Dunleavy* by noting that under the federal grant program at issue in *Dunleavy* Congress had delegated auditing responsibilities to federal agencies, whereas under the Medicaid program at issue in *Hays* Congress had delegated auditing responsibilities to a state agency. 325 F.3d at 989. But nothing in the statutory text of § 3730(e)(4)(A) indicates that Congress intended the meaning of the word "administrative" to vary depending upon the precise statutory scheme of the federal program under which the alleged fraud occurred. Moreover, the Ninth Circuit in the decision below did not read *Hays* as allowing non-federal sources to qualify under § 3730(e)(4)(A)'s second category only when the statutory scheme has delegated auditing authority to a state agency. Instead, the Ninth Circuit ignored that purported distinction and read *Hays* broadly to hold that § 3730(e)(4)(A)'s second category includes non-federal "administrative" sources regardless of the nature of the statutory scheme at issue. *See* Pet. App. 5a-6a ("We agree with the Eighth Circuit [in *Hays*] and now hold that the second category of sources includes non-federal reports, audits, and investigations.").

2. Eleventh Circuit. In *Battle v. Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006) (per curiam), the Eleventh Circuit sided with the Eighth Circuit, ruling that audits conducted by a state agency qualified as public disclosures under category two of § 3730(e)(4)(A)'s public disclosure bar. Battle was a former state university employee who brought suit against university officials alleging, *inter alia*, fraudulent practices in the Federal Work Study Program. *Id.* at 757. The Eleventh Circuit affirmed the district court's dismissal of Battle's *qui tam* claim. *Id.* at 762.[9] Without further discussion, the

[9] The district court cited the Eighth Circuit's decision in *Hays* in holding that § 3730(e)(4)(A)'s second category included "administrative

Eleventh Circuit concluded that, "[b]ecause Plaintiff's FCA claims rely chiefly on information that was publicly disclosed in the 1997-1998 and 1998-1999 state audits, the claims are barred unless Plaintiff qualifies as an original source." *Id.* at 762.

3. Ninth Circuit. The court below sided with the Eighth and Eleventh Circuits on the question presented and squarely rejected the Third Circuit's position, thereby creating a firm 3-1 split among the circuits. The Ninth Circuit explicitly acknowledged and rejected the Third Circuit's holding in *Dunleavy* that § 3730(e)(4)(A)'s second category includes only federal sources. Pet. App. 5a-6a. The Ninth Circuit instead expressly adopted the position of the Eighth Circuit in *Hays*, stating that "[w]e agree with the Eighth Circuit and now hold that the second category of sources includes non-federal reports, audits, and investigations." *Id.*

* * * * *

In sum, the decision below deepens an existing conflict among the courts of appeals. By holding that § 3730(e)(4)(A)'s second category includes non-federal "administrative" sources, the Eighth, Ninth, and Eleventh Circuits have taken a position diametrically opposed to the settled precedent of the Third Circuit, which has recently reaffirmed its unequivocal holding that § 3730(e)(4)(A)'s second category refers exclusively to sources originating with the federal government.

C. Two Other Circuits Have Expressed Support For The Interpretation Adopted By The Third Circuit

Two circuits that have not yet ruled on the question presented, the Tenth and Sixth Circuits, have indicated support for the Third Circuit's position that

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audits . . . conducted by state agencies." *United States ex rel. Battle v. Board of Regents*, No. CIVA 100CV-1637-TWT, 2005 WL 4880633, at *9 (N.D. Ga. Feb. 10, 2005).

§ 3730(e)(4)(A)'s second category includes only federal sources.

1. **Tenth Circuit.** In *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th Cir. 1996), a *qui tam* case decided before the Third Circuit's decision in *Dunleavy*, the Tenth Circuit observed that § 3730(e)(4)(A)'s second category could be construed to refer only to federal sources. The *Ramseyer* action was based upon information disclosed in a state audit and a state report. *Id.* But the relator failed to raise the argument that these state sources did not constitute sources of public disclosure under § 3730(e)(4)(A)'s second category. *Id.* The point was thus waived, and the court did not reach the merits of this issue. *Id.* Nonetheless, the Tenth Circuit pointedly indicated that the relator had missed the "potential argument" that neither the state audit nor the state report fell within the sources enumerated in § 3730(e)(4)(A)'s second category. *Id.*

2. **Sixth Circuit.** In *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 725 (6th Cir. 1999), the Sixth Circuit favorably addressed the reasoning of *Dunleavy*. The *Burns* court considered whether a FOIA request constituted a public disclosure under § 3730(e)(4)(A)'s second category. *Id.* at 723. In discussing category two, the Sixth Circuit noted the Third Circuit's reasoning in *Dunleavy* and cited it for the proposition that "'administrative reports' refer[s] only to reports produced by federal sources." *Id.* at 725. Although dictum, the Sixth Circuit's discussion of *Dunleavy* suggests that it found the Third Circuit's interpretation of § 3730(e)(4)(A)'s second category persuasive.

Both the Tenth and Sixth Circuits have thus expressed support in dictum for the construction of § 3730(e)(4)(A)'s second category adopted by the Third Circuit in *Dunleavy*. Given the well-reasoned and persuasive holding of the Third Circuit and the diametrically opposite position of the Eighth, Ninth, and Eleventh Circuits, there is little

prospect that the conflict among the circuits will resolve itself without a decision from this Court.

D. Opposing District Court Decisions In Several Circuits Further Demonstrate The Confusion Among The Lower Courts

In circuits in which courts of appeals have not yet addressed the issue, district courts have similarly split on whether § 3730(e)(4)(A)'s second category refers exclusively to sources originating with the *federal* government.

District courts in the Tenth Circuit, for example, have taken diametrically opposite positions on the question whether a non-federal report is an "administrative" report within the public disclosure bar of § 3730(e)(4)(A). One such court held that an audit report originating with the State of Oregon did *not* constitute a source of public disclosure under § 3730(e)(4)(A)'s second category. *See United States ex rel. Fine v. MK-Ferguson Co.*, 861 F. Supp. 1544, 1550 (D.N.M. 1994). A different district court in the Tenth Circuit, on the other hand, held that a report originating with a state did fall within § 3730(e)(4)(A)'s second category. *See In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1143-44 (D. Wyo. 2006) (following *Hays* and holding that a report prepared by the State of Alabama constituted a public disclosure).

In the Fifth Circuit as well, district courts have taken conflicting approaches. In *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System*, 274 F. Supp. 2d 824, 845 (S.D. Tex. 2003), the court held that an audit prepared by Blue Cross and Blue Shield of Texas fell within § 3730(e)(4)(A)'s second category because Blue Cross acted as a "federal administrative agency" when it served as the fiscal intermediary for Medicare. In *United States ex rel. Farmer v. City of Houston*, No. Civ.A. H-03-3713, 2005 WL 1155111, at *4 (S.D. Tex. May 5, 2005), the court held that a response by a state agency to a request under the Texas Public Information Act constituted a public disclosure within the meaning of § 3730(e)(4)(A).

In the Sixth and Seventh Circuits, district courts also illustrate the confusion among the federal courts on this issue. One district court in the Sixth Circuit has observed — without reaching the issue — that, under *Dunleavy*, reports obtained via the Kentucky Open Records Act would not fall within § 3730(e)(4)(A)'s second category "unless the underlying information included reports or investigations performed by federal administrative agencies." *United States v. Solinger*, 457 F. Supp. 2d 743, 752 n.7 (W.D. Ky. 2006). And in *Feingold v. Associated Insurance Cos.*, No. 98 C 4392, 2001 WL 1155250, at *5 (N.D. Ill. Sept. 28, 2001), the court held that reports prepared by the federal Health Care and Financing Administration fell within category two precisely because the reports originated with an agency of the federal government. *See also United States ex rel. O'Keeffe v. Sverdup Corp.*, 131 F. Supp. 2d 87, 92 (D. Mass. 2001) (holding that a report co-authored by the Massachusetts Bay Transit Authority and the U.S. Department of Transportation fell within category two because a federal agency was the co-author of the report).

The foregoing district court cases thus demonstrate that the question presented is frequently litigated, that the courts are deepening the conflict among the circuits, and that this Court's construction of § 3730(e)(4)(A) is urgently needed to bring clarity to this important question.

II. THE CALIFORNIA AUDIT DOES NOT CONSTITUTE "PUBLIC DISCLOSURE" UNDER 31 U.S.C. § 3730(e)(4)(A) BECAUSE IT IS NOT A FEDERAL ADMINISTRATIVE REPORT OR AUDIT

Section 3730(e)(4)(A) of the FCA lists the sources of public disclosure that give rise to a jurisdictional bar when the relator is not an original source of the information. The listed sources can be divided into three categories: (1) "a criminal, civil, or administrative hearing"; (2) "a congressional, administrative, or [GAO] report, hearing, audit, or investigation"; and (3) "the news

media." 31 U.S.C. § 3730(e)(4)(A). The court below erroneously concluded that the audit report produced by the California State Auditor constitutes a source of public disclosure under the second category, thereby barring petitioner's FCA action. *See* Pet. App. 5a-6a. This conclusion is contrary to the plain language of the statute and inconsistent with the structure and purpose of the 1986 Amendments to the FCA.

A. The Second Category Of The FCA's Public Disclosure Bar Refers To Federal, Not State And Local, Administrative Actions

The FCA's public disclosure bar is triggered by a public disclosure of allegations or transactions of fraud in "a congressional, administrative, or [GAO] report, hearing, audit, or investigation." 31 U.S.C. § 3730(e)(4)(A). Standing alone, the word "administrative" may be capable of many meanings. Within the context of § 3730(e)(4)(A), however, it refers to *federal* administrative reports, hearings, audits, and investigations.

The plain language of § 3730(e)(4)(A) indicates that Congress intended the second category of this provision to bar *qui tam* actions only when the basis of the fraud is disclosed in *federal* administrative sources. The word "administrative" is sandwiched between references to Congress and the GAO, two obviously federal sources. When interpreting a statutory phrase that includes a string of terms, the fact that "several items in [the] list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511 U.S. 368, 371 (1994); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps."); *Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990) ("[W]ords grouped in a list should be given related meaning.") (internal quotation marks omitted). The common attribute in § 3730(e)(4)(A)'s second category is the federal nature of the specified sources of public disclosure. Because Congress placed "administrative" between references to

Congress and the GAO, the term "administrative" plainly refers to federal administrative disclosures only.

A contrary interpretation — reading the term "administrative" in the second category to include non-federal sources, expands the scope of the public disclosure bar substantially beyond the plain meaning of the statute. When a potentially ambiguous statutory word is included in a list of terms with clear meanings and common attributes, interpreting the ambiguous word consistently with the common attributes of the surrounding terms prevents courts from "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson*, 513 U.S. at 575 (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). This form of judicial restraint is particularly important when interpreting a jurisdictional bar added in an amendment process designed to expand, not constrain, the ability of relators to bring FCA claims. *See, e.g., Reves v. Ernst & Young*, 494 U.S. 56, 62-63 (1990) (concluding that the phrase "any note" in the Securities Exchange Act of 1934 "should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts").

B. The History Of The 1986 Amendments To The False Claims Act Confirms The Statute's Plain Meaning

The current version of the FCA deliberately contains a public disclosure bar intended to preclude only truly parasitic *qui tam* actions based upon information already disclosed in sources likely to alert the federal government to the alleged fraud. Interpreting § 3730(e)(4)(A)'s second category to include non-federal sources would frustrate the purposes of the 1986 Amendments.

The 1986 Amendments responded to the extraordinary restrictions on *qui tam* actions contained in the 1943 FCA and to the pressing need to supplement federal anti-fraud

efforts with greater private enforcement. Congress emphasized the difficulty of detecting such fraud "without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." S. Rep. No. 99-345, at 4. The 1986 Amendments thus focused on creating greater incentives for potential relators with information about fraud to bring *qui tam* suits. Accordingly, Congress "increased monetary awards, adopted a lower burden of proof, and allowed the *qui tam* plaintiff to remain a party in the action even if the Government intervenes." *Stinson*, 944 F.2d at 1154.

In addition, Congress replaced the very general "government disclosure bar" of the 1943 Amendment with the current act's more specific and more limited "public disclosure bar." *See* 31 U.S.C. § 3730(e)(4)(A). Unlike the 1943 "government disclosure bar," which prohibited the filing of a *qui tam* action based on "evidence or information in the possession of the United States . . . at the time such suit was brought," the current public disclosure bar enumerates and limits the sources that constitute public disclosures. Those 1986 Amendments to the disclosure bar provision, therefore, serve a critical function of limiting the scope of the jurisdictional bar and expanding the number and type of permissible *qui tam* actions. To broadly construe that bar to include state and local sources, as three circuits have now done, functionally eviscerates an important facet of the 1986 Amendments' effort to expand the types of suits that relators can bring.

C. Interpreting The Second Category Of The Public Disclosure Bar To Prohibit *Qui Tam* Actions Based On State And Local Administrative Disclosures Would Create Perverse Incentives For States And Localities, And Would Substantially Undermine The Federal Government's Ability To Redress Fraudulent Activity By State And Local Actors

State and local administrative reports, audits, hearings, and investigations are not the types of public disclosures

likely to put the federal government on notice of fraud by state and local actors. These reports are often prepared by the very entity committing the fraud, making blatant and transparent disclosure highly unlikely. The public disclosure bar is triggered whenever all of the essential elements of the fraud are made public, regardless of whether those disclosures are "readily comprehensible" or easily deciphered. *See Springfield*, 14 F.3d at 655. Expanding the bar to include state and local administrative reports would permit — even encourage — state and local agencies to creatively disclose fraudulent behavior in their reports, thereby insulating themselves from *qui tam* actions and making it exceedingly unlikely that the federal government will discover their fraudulent activities.

Moreover, state and local administrative reports are likely to be of very limited public circulation. For example, the report that forms the basis of the public disclosure ruling in this case was transmitted to the Governor of California, the President Pro Tempore of the State Senate, and the Speaker of the California Assembly. *See* State Defendants'/Appellees' C.A. Br. 24. It was also posted on the Internet with a link on the home page of the Bureau of State Audits. *See supra* note 3. Disclosures buried this deeply in state or local bureaucracies are extremely unlikely to alert the federal government to fraudulent action.

The *qui tam* provisions of the FCA are intended to create incentives for private attorneys general to ferret out hidden evidence of fraud against the federal government. Interpreting the public disclosure bar to encompass disclosures made in state and local administrative reports creates just the opposite incentives: it encourages states and localities to cloak disclosures of their fraudulent activities in their own administrative reports and thereby to insulate those activities from the fruitful scrutiny of private attorneys general.

III. WHETHER AN ADMINISTRATIVE REPORT, AUDIT, OR INVESTIGATION MUST COME FROM A FEDERAL SOURCE TO TRIGGER THE PUBLIC DISCLOSURE BAR IS AN ISSUE OF EXCEPTIONAL IMPORTANCE

The rule applied below by the Ninth Circuit substantially impairs the federal government's ability to police fraud costing taxpayers tens of billions of dollars each year. Moreover, the uncertainty and lack of uniformity is profoundly unfair to both plaintiffs and defendants, and deters legitimate *qui tam* actions.

A. The Rule Permitting Non-Federal Sources To Trigger The Public Disclosure Bar Insulates State And Local Governments From *Qui Tam* Suits, Substantially Impairing The Federal Government's Ability To Police Fraud

State and local fraud against the federal government is a long-standing problem. Each year the federal government distributes more than $400 billion in federal funds to state-administered programs and other non-federal entities.[10] For fiscal year 2005, estimated improper payments in this area exceeded $38 billion, not including some of the largest and highest-risk state-administered programs such as Medicaid.[11]

The *qui tam* provisions of the FCA play a crucial role in policing this type of fraud by encouraging relators to discover and prosecute misconduct that the federal government would be unlikely to discover on its own. In the

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[10] *See* U.S. Gov't Accountability Office, *Improper Payments: Federal and State Coordination Needed to Report National Improper Payment Estimates on Federal Programs* 1 (Apr. 2006), *available at* http://www.gao.gov/new.items/d06347.pdf. State-administered programs are federal programs that are managed on a day-to-day basis at the state level. Such programs include Medicaid, Highway Planning and Construction, the Food Stamp Program, Temporary Assistance for Needy Families, and Unemployment Insurance. Medicaid alone had outlays exceeding $181 billion dollars in fiscal year 2005.

[11] *See id.*

Eighth, Ninth, and Eleventh Circuits, however, disclosure in state and local documents — no matter how obscure or inaccessible — of the factual basis for a fraud claim effectively insulates states and localities from *qui tam* actions based on those disclosures. That safe harbor exists regardless whether anyone associated with the federal government actually receives or reads the report. Thus, the majority rule in the circuits essentially repeals an important component of the 1986 Amendments and substantially undermines the federal government's ability to police fraud in the multi-billion dollar arena of state-administered programs.

B. Lack Of Uniformity Among The Circuits About Whether State And Local Sources Trigger The Bar Creates Profound Unfairness For *Qui Tam* Relators Who Sue Defendants That Are Not Subject To Suit In The Third Circuit

The lack of uniformity among the circuits makes a relator's ability to pursue a *qui tam* suit arbitrarily and unfairly depend on where the defendant is subject to suit.[12] If petitioner had brought an otherwise identical suit against the Pennsylvania Office of Vocational Rehabilitation in the United States District Court for the Eastern District of Pennsylvania, for example, disclosures of an identical nature contained in an audit by the State of Pennsylvania would not have barred her *qui tam* action.

The 1986 Amendments were intended to facilitate the exposure and prosecution of fraud against the federal government where it occurs. The ability of a citizen to

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[12] This Court recently recognized the importance of uniformity in the context of the public disclosure bar by hearing argument on a closely related provision of § 3730(e)(4). *See United States ex rel. Stone v. Rockwell Int'l Corp.*, No. 05-1272 (argued Dec. 5, 2006). At issue in *Rockwell* is the proper interpretation of the original source exception to the public disclosure bar. This case raises the antecedent question of which sources trigger the public disclosure bar. So long as uncertainty exists as to when the bar applies, this Court's efforts to clarify the exception to that bar through *Rockwell* will be undermined by litigants who seek an expansive interpretation of the public disclosure bar.

protect the federal coffers from state and local fraudulent claims should not depend on the geographic placement of the state within our union.[13]

C. Continuing Uncertainty About The Scope Of The Public Disclosure Bar Deters Relators From Bringing Legitimate *Qui Tam* Actions

Pursuing a *qui tam* action on behalf of the federal government against a large defendant is time consuming and expensive,[14] and entails significant risk of retaliation.[15] Uncertainty regarding the scope of the public disclosure bar will deter relators and their counsel from making these investments and incurring these risks. Thus, the existing conflict among the circuits serves to undercut the principal goal of the 1986 Amendments, which was to encourage more *qui tam* actions by private relators. As a consequence, ongoing fraud that would be a legitimate target of a valid *qui tam* action continues unabated, costing the federal government billions of dollars.

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[13] The lack of uniformity also unfairly affects defendants. Under § 3732(a), the FCA permits an action to be brought "in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred." 31 U.S.C. § 3732(a). Thus, a company with offices in New Jersey and California may be sued within the Third Circuit and not receive the same benefit from the public disclosure bar as a competing company that does business only in the Ninth Circuit, which will be protected by the public disclosure bar in precisely the same circumstances.

[14] Congress expressly recognized the impact of these costs by permitting relators to recoup attorneys' fees and litigation expenses in successful actions. *See* 31 U.S.C. § 3730(d).

[15] Again, Congress addressed these risks in the 1986 Amendments, but the availability of a legal remedy for retaliation does not eliminate all the risk inherent in a *qui tam* action. *See* 31 U.S.C. § 3730(h) (addressing employee discharge, harassment, suspension, and threats); *see also* Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 Sup. Ct. Econ. Rev. 135, 159 (2006) (noting that, despite protection under the FCA, whistleblowers face substantial private risks that may prevent them from disclosing the fraud).

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT AMONG THE COURTS OF APPEALS

The proper interpretation of the second category of the FCA's public disclosure bar is ripe for this Court's review. Moreover, this case cleanly presents that important issue. It is accordingly an ideal vehicle to resolve the entrenched conflict among the courts of appeals.

A. This Court Will Not Benefit From Further Percolation In The Lower Courts

The courts of appeals have analyzed the question presented here for more than a decade, and the Eighth, Ninth, and Eleventh Circuits have staked out positions that clearly conflict with the Third Circuit's entrenched *Dunleavy* rule. Indeed, both the court below, *see* Pet. App. 5a-6a, and the Eighth Circuit, *see Hays*, 325 F.3d at 988, have acknowledged the conflict. And the Third Circuit reaffirmed its *Dunleavy* rule earlier this year, after the Ninth Circuit issued the incompatible decision below. *See Atkinson*, 473 F.3d at 520 n.21, 523. Commentators, beginning in 1998, have also discussed the Third Circuit's position and the likelihood that this Court would need to resolve the conflict. *See* Theodore K. Stream & Jamie E. Wrage, *Preserving the False Claims Act*, 45 Fed. Law., June 1998, at 56, 58-59.

The conflict is fully developed without any realistic prospect of being resolved in the lower courts, therefore, and it is ripe for adjudication by this Court. Further percolation is likely only to increase confusion and impede the ability of relators to bring viable *qui tam* actions.

B. This Case Raises The Question Presented In Pure Form, Without Extraneous Issues Or Alternative Grounds Of Decision

The decision below cleanly presents the question whether a state or local administrative audit or report triggers the public disclosure bar of the FCA. This petition addresses only this one aspect of the decision below, which affected only the claims from June 1997 through

June 1999. No other claims are implicated. And, for those claims that are involved, no other aspect of the public disclosure bar is relevant. Thus, the only question to be decided is whether as a matter of law an administrative report must be federal to trigger the public disclosure bar under the FCA. Because there was no dispute about which report constituted the public disclosure or the source of that state report, the Ninth Circuit's construction of the FCA is a holding that presents an especially clean vehicle for the resolution of the conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 16, 2007

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Statutory Provisions Involved:

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55556
(D.C. No. CV-01-08716-DDP)

UNITED STATES EX REL. CHARLOTTE RAE BLY-MAGEE,
Plaintiff-Appellant,

v.

BRENDA PREMO, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted February 13, 2006
Filed December 13, 2006

Before: CANBY, JR., NOONAN, and BERZON, Circuit Judges.

CANBY, Circuit Judge:

In 2001 Charlotte Bly-Magee filed this *qui tam* action under the False Claims Act, 31 U.S.C. § 3729. She accuses the California Department of Rehabilitation ("CDR") and its employees of defrauding the federal government. The district court dismissed her Second Amended Complaint, without leave to amend. The district court held that Bly-Magee had failed to overcome the False Claims Act's jurisdictional bar that precludes private actions based on public disclosure of allegations unless the relator who is bringing the action is an original source of the information. *See* 31 U.S.C. § 3730(e)(4)(A). Bly-Magee now appeals.

Background

For over a decade, Bly-Magee has been pursuing *qui tam* actions against CDR. She initially suspected CDR of filing false claims while she was serving as the executive director of Southern California Rehabilitation Services, a non-profit organization that receives federal and state funds to serve the disabled. Shortly after leaving Southern California Rehabilitation Services, she filed the first of three *qui tam* actions ("*Bly-Magee I*"). The government declined to intervene in this action.[1] A district court granted summary judgment against Bly-Magee, and she did not appeal.

Despite this loss, Bly-Magee continued to investigate what she believed was CDR's misappropriation of federal funds. In 1997 she filed a second *qui tam* action ("*Bly-Magee II*") against CDR. The government again declined to intervene. The district court dismissed the action and Bly-Magee appealed. In a memorandum disposition filed contemporaneously with this opinion, we have affirmed the district court's dismissal of *Bly-Magee II*.

While *Bly-Magee II* was pending, Bly-Magee filed her third *qui tam* suit ("*Bly-Magee III*"), which is the subject of this appeal. She accuses CDR and various CDR employees of submitting false claims stemming from an alleged "kick-back" scheme with state agencies. The district court dismissed the Second Amended Complaint for failure to overcome the False Claims Act's jurisdictional bar. Bly-Magee now seeks review of this decision.

We have jurisdiction under 29 U.S.C. § 1291 to review the district court's final order. We review de novo the dismissal for lack of subject matter jurisdiction. *Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 392

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[1] The False Claims Act provides for a private *qui tam* complaint, which asserts a claim in the name of the Government, to be served on the Government and filed under seal for at least 60 days. During that period (or extensions of it), the Government may elect to intervene and conduct the litigation, or may decline and leave the conduct of the litigation to the private relator. *See* 31 U.S.C. § 3730(b)(2), (3) & (4).

(9th Cir.2002), *amended by* 319 F.3d 1078 (9th Cir.2003). We affirm in part, reverse in part, and remand.

Discussion

1. Public Disclosure Through Bly-Magee II

The False Claims Act deprives the district court of jurisdiction over a *qui tam* action that is based on allegations or transactions previously publicly disclosed, unless the relator is the original source of the allegations. 31 U.S.C. § 3730(e)(4)(A). More specifically, the False Claims Act provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Id. The district court lacked jurisdiction over the complaint's allegations of false claims that occurred on or before June 1997 because they were publicly disclosed in *Bly-Magee II* and because Bly-Magee did not establish that she was the original source of the information.[2]

In *Bly-Magee II*, Bly-Magee accused the defendants of violating the False Claims Act from October 1992 to June 1997. In *Bly-Magee III*, she accused the defendants of similar violations from fiscal year 1995-1996 to fiscal year 1999-2000. Thus, there is approximately a two-year overlap between the complaints. Both complaints allege that the defendants violated federal procurement standards in awarding contracts, forced the Government to "purchase unnecessary and duplicative services," gave contracts to irresponsible parties, and falsely certified that they had

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[2] Bly-Magee has the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1018 (9th Cir.1999).

conducted audits. The allegations in *Bly-Magee III* that occurred during the complaints' overlapping time period—on or before June 1997—were therefore publicly disclosed in *Bly-Magee II*. *See A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1243 (9th Cir.2000) (requiring public disclosure "of the 'allegations or transactions' giving rise to the relator's claim, as opposed to 'mere information'") (internal citation omitted).

Bly-Magee has not demonstrated by a preponderance of the evidence that she was the original source of the information upon which these allegations were based. *See Harshman*, 197 F.3d at 1018. Her employment at Southern California Rehabilitation Services and her claim that she conducted her own investigation are insufficient to show that she had direct knowledge of a scheme to submit false claims. *See* 31 U.S.C. §.3730(e)(4)(B) (defining an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based . . . ."). Bly-Magee submitted a declaration to the district court that provided a lengthy explanation of her involvement with Southern California Rehabilitation Services and her investigation, but her recital is fatally short of specifics on the most material point: she still failed to show direct and independent knowledge of the information underlying her complaint. Thus, Bly-Magee did not establish that she was the original source of the allegations publicly disclosed in *Bly-Magee II*.

2. Public Disclosure Through the California Audit

The disclosure in *Bly-Magee II* extended only through June 1997. There was a further public disclosure, however, of the facts underlying the false claims that Bly-Magee alleged were made between June 1997 and June 30, 1999. That disclosure occurred in a published audit report produced by the California State Auditor and entitled "California's Vocational Rehabilitation Program: Although Federal Requirements Have Contributed to its Rising Costs, by More Effectively Managing the Program, the Department of Rehabilitation Can Better Serve More

Californians with Disabilities." The question then arises whether disclosure in that report, issued by a state agency, amounts to a "public disclosure" for purposes of the False Claim Act.

Section 3730(e)(4)(A) lists the sources of public disclosure that give rise to a jurisdictional bar when the relator is not an original source of the information. The listed sources can be divided into three categories: (1) "a criminal, civil, or administrative hearing"; (2) "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation"; and (3) "the news media." *Id.* The California audit report would appear to fall under category (2) as an "administrative . . . report [or] audit." Some doubt arises, however, because the other sources in category (2), such as congressional reports or reports of the Government Accounting Office, refer exclusively to *federal* agency materials.

This court has not previously addressed whether an administrative report, audit, or investigation prepared by a state entity (as opposed to the federal government) qualifies as a source of public disclosure under the second category.[3] Two circuits that have addressed the question have reached opposite conclusions. In *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir.1997), the Third Circuit applied the doctrine of *noscitur a sociis* and held that, because the word "administrative" is placed between "congressional" and "Government Accounting Office," when read with the word "report" it "refers only to those administrative reports that originate with the federal government." *Id.* In *Hays v. Hoffman*, 325 F.3d 982, 988 (8th Cir.2003), the Eighth Circuit rejected *Dunleavy* and concluded that Medicaid audits prepared by a state agency are public disclosures within the meaning of the Act. We agree with the Eighth

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[3] We have held that state and local administrative hearings can qualify as sources of public disclosure under the first category. *A-1 Ambulance*, 202 F.3d at 1243-44.

Circuit and now hold that the second category of sources includes non-federal reports, audits, and investigations.[4]

Even when it is read literally, the language of § 3730(e)(4)(A) does not compel a conclusion that "administrative" in category (2) means "federal administrative"—a phrase that Congress could have used but did not. The words "congressional" "administrative" and "Government Accounting Office" are separated by commas and the conjunction "or." *Id.* Accordingly, each word may be read as a separate modifier for the nouns that follow. *See generally Flora v. United States*, 362 U.S. 145, 150, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960) (confirming that grammar can be relevant to statutory interpretation). As long as this reading of the plain language produces a reasonable interpretation consistent with the rest of the statute, it should control. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (explaining that the process of statutory interpretation ceases if the language is plain and "'the statutory scheme is coherent and consistent'") (citation omitted).

This interpretation is consistent with our holding in *A-1 Ambulance* that state and local administrative hearings are sources of public disclosure. 202 F.3d at 1244. Indeed, the statute would seem to be inconsistent if it included state and local administrative hearings as sources of public disclosures and then, in the next breath, excluded state administrative reports as sources. The purpose of requiring public disclosures to come from these sources is to deter opportunistic relators from filing *qui*

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[4] In holding in *A-1 Ambulance* that category (1) included state and local administrative hearings as sources of disclosure, we distinguished *Dunleavy* as dealing with category (2). 202 F.3d at 1244-45. We did state, however, that *Dunleavy* buttressed our conclusion because one may presume that Congress intended different contexts in repeating "administrative" in the two clauses. *See id.* at 1245. We nevertheless did not purport to construe category (2) authoritatively in *A-1 Ambulance*, but simply observed that if *Dunleavy* was correctly decided that circumstance would lend additional support to the statutory interpretation adopted in *A-1 Ambulance*.

tam suits based on information already known to the federal government. *See Wang v. FMC Corp.*, 975 F.2d 1412, 1418-19 (9th Cir.1992) (explaining the history of the 1986 amendments to the False Claims Act that created these categories). The federal government is no less likely to obtain information from a state administrative audit than it is from a state administrative hearing.

The likelihood that the information will be brought to the federal government's attention is heightened in cases like this where the audited program is connected significantly to federal regulations and funds. *See Hays*, 325 F.3d at 989 (noting that a state investigation into Medicaid fraud can lead to federal enforcement actions because Medicaid is a heavily regulated federal program). CDR primarily administers the Vocational Rehabilitation Program, supported by both federal and state funds and authorized by the federal Rehabilitation Act of 1973, 29 U.S.C. § 504, as amended 29 U.S.C. § 794. California is required to submit annual reports to the federal government on the administration of the program. 29 U.S.C. § 721(a)(15). California also must create a State Rehabilitation Council, *id.* § 725(a)(1), that provides progress reports to the federal government. *Id.* § 725(c)(2)(B). Essentially, CDR's operation depends on federal funding and compliance with federal regulations. It thus is similar to the Medicaid program in *Hays*. *See* 325 F.3d at 989 (explaining the significant federal regulation and cooperation for Medicaid). In light of the federal government's significant involvement with the Vocational Rehabilitation Program, it is just as likely that the government would become aware of fraud through a state audit as through a state hearing.

Finally, our interpretation of § 3730(e)(4)(A) does not create the anomalous situation feared by the court in *Dunleavy*. *See* 123 F.3d at 745. There, the Third Circuit expressed concern that state and local governments that are committing fraud might artfully craft reports or audits sufficient to constitute disclosure under the False

Claims Act but insufficient to alert the federal government to the fraud. *Id.* The court feared that legitimate *qui tam* suits thus could be barred on the ground that the allegations were disclosed in reports or audits produced by the entity accused of fraud. *Id.* This fear is unfounded in this case because the State Auditor is an entity independent of CDR. The fear is unfounded in general because it is unlikely that an agency trying to cover up its fraud would reveal the requisite "allegations or transactions" underlying the fraud in a public document. The public disclosure of "mere information" relating to the claims is insufficient to trigger a jurisdictional bar to a False Claims suit; the "material elements of the allegedly fraudulent 'transaction'" must be disclosed. *A-1 Ambulance*, 202 F.3d at 1243 (quoting *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir.1996)). Even if such a fear were well-founded, it would extend equally to state administrative hearings, which can be sources of public disclosure under the first category. Thus, the concern that doctored state reports will bar legitimate *qui tam* actions is an insufficient basis for distinguishing between state hearings and state audits, reports, and investigations.

In sum, our holding that the California administrative audit is a source of public disclosure is supported by § 3730's text, is consistent with *A-1 Ambulance*, and accomplishes the goals of the jurisdictional bar.[5]

The allegations upon which Bly-Magee's present lawsuit is based are clearly set forth in the State Auditor's report, which discusses CDR's administration until June

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[5] Our recent decision in *United States ex rel. Haight v. Catholic Healthcare West*, 445 F.3d 1147 (9th Cir.2006), has no bearing on this holding. In that case, we observed in a footnote that the first and second categories in § 3730(e)(4)(A) are "a form of work product originating with the government" and that "[t]he contents of those sources is expected to be well-known to the government." *Id.* at 1153 n. 3. Although the government at issue in *Haight* was the federal government, the question of whether these categories were limited to federal government work products was not before the *Haight* panel.

30, 1999. The audit thus publicly disclosed the allegations.

For the same reasons that Bly-Magee failed to establish that she was an original source of the disclosure in *Bly-Magee II*, she failed to establish that she was an original source of the information in the State Auditor's report. The district court accordingly lacked jurisdiction to entertain any of Bly-Magee's false claims allegations relating to events occurring on or before June 30, 1999.

3. Bly-Magee's Allegations After June 30, 1999

Bly-Magee alleges in her complaint, however, that the false claims continued through the 1999-2000 fiscal year, which ended June 30, 2000. We conclude, therefore, that on the present record the district court appears to have had jurisdiction over allegations in the complaint of false claims occurring after June 30, 1999, because they were not publicly disclosed.

We accordingly reverse the dismissal of those portions of the complaint alleging the making of false claims after June 30, 1999. We remand for further proceedings regarding those allegations. We note that the complaint's allegations of false claims made after June 30, 1999, are exceedingly general, and our remand does not foreclose the district court from further actions to clarify the complaint and to ensure that false claims made after this date are indeed subjects of the complaint. We also express no opinion regarding the sufficiency of the allegations under Fed.R.Civ.P. 9(b)—a question not reached by the district court.

Each party will bear its own costs on this appeal.

The judgment of the district court is **AFFIRMED in part, REVERSED in part, and REMANDED.**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-01-08716 DDP (PJWx)

UNITED STATES EX REL. CHARLOTTE BLY-MAGEE,
Plaintiff,

v.

BRENDA PREMO, ET AL.,
Defendants.

[Dec. 7, 2004]

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

This matter is before the Court on two motions to dismiss the qui tam plaintiff's second amended complaint. These motions have been brought by, on the one hand, the defendants Los Angeles County Office of Education and the County of Los Angeles, and, on the other, the defendants Catherine Campisi, Melinda Wilson, Warren Hayes, Lana Frasier, and Brenda Premo. After reviewing the papers submitted by the parties, and the arguments contained therein, the Court grants the defendants' motions and adopts the following order.

I. Background

A. Factual Allegations

The plaintiff/relator Charlotte Bly-Magee ("Bly-Magee" or the "plaintiff") brought the instant action on behalf of the United States against multiple defendants for alleged violations of the False Claims Act, 31 U.S.C. §§ 3729 et seq. As it must in considering a motion to dismiss, the Court views the allegations in the light most favorable to plaintiff. North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir.1983).

The plaintiff's charges involve the federal disbursement of funds to state governments pursuant to the Rehabilitation Act, 29 U.S.C. §§ 720, et seq. Each year the federal government distributes to the states grants that are to be used to help provide assistance to persons with disabilities in obtaining gainful employment. The funds are awarded to the states on a per capita basis in the form of a matching grant and in return the state agrees to contribute a share of every grant dollar "drawn down" from its allocation. (Sec. Am. Compl. ("SAC") ¶ 42.) The federal government contributes the rest. The California Department of Rehabilitation ("CDR") is the agency designated by the state of California to administer and distribute the matching funds, which amount to more than $250 million per year. (Id. ¶ 43.)

The essence of the plaintiff's complaint is that certain individual CDR employees devised a scheme whereby they awarded federal rehabilitation funds to state agencies, local governments, and school districts in return for inflated "paper" contributions that were then fraudulently certified to the federal government as the state's matching share.[1] (Id. ¶ 44.) The alleged purpose of this scheme was to obtain the maximum federal allocation of rehabilitation funds in order to divert state funds to facilitate an enlarged bureaucracy. (Id. ¶ 47.) The plaintiff alleges that the recipients of the federal funds, such as the defendants Los Angeles County Office of Education ("LACOE") and the County of Los Angeles ("County"), willingly participated in this "shell game" in order to garner the federal subsidies without having to actually improve or

[1] The plaintiff names ten CDR employees as defendants: Brenda Premo ("Premo"), Catherine Campisi ("Campisi"), Melinda Wilson, Jim Kay, Warren Hayes, Keith Foster, Lana Frasier, Edna Larsen, Kenneth Smedberg, and Verne Albright (collectively "the CDR defendants").

enlarge services to individuals with disabilities.[2] (Id. ¶ 50.)

More specifically, the plaintiff alleges that defendants engaged in the following fraudulent acts:

- Defendants fraudulently induced the federal government to contribute to the provision of rehabilitation services when it had already paid the state for those services under the Individuals with Disabilities Act. (Id. ¶ 44.)
- The CDR defendants limited the distribution of federal funds to agencies that agreed to their scheme. By so doing, the CDR employees effectively denied the ultimate beneficiaries a range of vocational assistance service providers from which to choose, thereby violating various federal regulations. (Id. ¶¶ 44, 46.)
- By facilitating the inflation of service costs, the CDR defendants created a fiscal crisis that ultimately led the CDR to resort to an order of selection, limiting state rehabilitation services to the most severely disabled clients. (Id. ¶ 48.)
- In 1995, defendant Premo included numerous false statements in the State Plan submitted to the federal government, including the certification that the state was providing services to disabled clients in all of its political subdivisions. (Id. ¶¶ 49, 56.) Beginning in 1999, Premo falsely certified that more clients were being served by the state when in fact fewer clients were receiving vocational assistance. (Id. ¶ 49.)
- Beginning in 1995, the CDR defendants falsely certified in reports to the federal government that (1) disabled individuals would be afforded the right of informed choice guaranteed by the Rehabilitation Act; (2) rehabilitation funds would be used in compliance

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[2] The plaintiff erroneously refers to the County as the "Los Angeles County Department of Mental Health" in her complaint. The County has never argued that it was not put on notice of the claims due to the plaintiff's error in naming it.

with various government regulations as contained in Office of Management and Budget Circulars A-87, A-102, and A-133; (3) contracts would be awarded in compliance with the Anti-Kick Back Act; (4) contracts would be awarded pursuant to the federal procurement regulations; (5) services would be provided to all political subdivisions of the state; and (6) provisions of services would be made by an order of selection. (Id. ¶¶ 56-65.)

- LACOE deliberately misclassified students as severely disabled in order to qualify for federal matching funds. (Id. ¶ 52.)

The plaintiff asserts that she gained knowledge of the false certifications during and following her employment as the executive director of Southern California Rehabilitation Services ("SCRS"), a non-profit agency that received federal and state rehabilitation funds. (Id. ¶ 26.) The plaintiff alleges that she was forced from her position in 1991 after uncovering evidence of theft of millions of dollars of equipment by state employees. (Id.) She claims that, after her termination, she continued to work with SCRS. (Id.) The plaintiff also alleges that she further acquired knowledge of the alleged fraud when she was denied services as a disabled individual in 1995 by the Pasadena CDR office. (Id.) This denial, based on an order of selection issued by defendant Premo, prompted the plaintiff to embark on a two year investigation of CDR that led her to uncover the alleged fraud. (Id.)

The plaintiff sets forth five claims against the defendants. These are (1) Submission of False Claims (against the CDR defendants); (2) Conspiracy to Submit False Claims (against the CDR defendants); (3) Conspiracy to Submit False Claims (against the CDR defendants, LACOE, and the County); and (4) Conspiracy to Submit False Claims (against the CDR defendants, LACOE, and the County).

B. Procedural Background

As described in this Court's previous order granting the CDR defendant's motion to dismiss the plaintiff's first amended complaint (the "June 2004 Order"), the plaintiff has brought a series of False Claims Act cases in federal court. In 1992, Bly-Magee filed Case No. CV 92-0403 RJK ("Bly-Magee I") in the Central District of California alleging that the CDR and its employees (1) misappropriated equipment purchased for use under Department of Education rules, (2) made misrepresentations regarding the inventory and use of equipment, and (3) did not submit contracts for bid. The government declined to intervene. In February 1995, the court granted the defendants' motion for summary judgment. The plaintiff did not appeal.

In 1997, the plaintiff brought a second False Claims Act case in the Central District of California, Case No. CV 97-4101 MRP against, inter alia, certain CDR employees ("Bly-Magee II").[3] The government declined to intervene. The third amended complaint is still pending before Judge Kelleher in the Central District.

On October 10, 2001, Bly-Magee filed the instant suit ("Bly-Magee III").[4] On April 12, 2004, the Court issued an order granting LACOE's and the County's motion to dismiss the first amended complaint ("April 2004 Order") on the basis that the allegations contained therein lacked specificity under Fed. R. Civ. P. 9(b). In its June 2004 Order, the Court granted the CDR defendants' motion to dismiss because the Court found that it was deprived of subject matter jurisdiction under the jurisdictional bar provision of the False Claims Act, 31 U.S.C.

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[3] Defendants in the 1997 case include the following CDR employees: Barbara Hooker, Hao Lam, Joseph Kleir, Edna Larsen, Melinda Wilson, Brenda Premo, Kenneth Smedburg, Lisa Coyne, and Verne Albright.

[4] Plaintiff originally named the Los Angeles Unified School District ("LAUSD") as a defendant in this suit. In March 2004, the Court granted LAUSD's motion to dismiss because, as a state agency, LAUSD cannot be sued as a "person" under the False Claims Act.

§ 3730(e)(4)(A). In both instances, the Court granted Bly-Magee leave to amend so that she might cure the specificity and jurisdictional defects. On August 2, 2004, Bly-Magee filed a second-amended complaint.

II. Discussion

A. Legal Standard

Dismissal under Rule 12(b)(6) is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Newman v. Universal Pictures, 813 F.2d 1519, 1521-22 (9th Cir.1987) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). Accordingly, the Court must "accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 923 (9th Cir.2001) (citation omitted). Nonetheless, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss . . ." Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir.2004).

B. The False Claims Act's Jurisdictional Bar

Federal courts have no power to consider claims for which they lack subject matter jurisdiction. Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986). It follows that, before considering the substantive arguments raised by the defendants, the Court must first address whether Bly-Magee's second amended complaint cures the jurisdictional defects found in her first amended complaint.

The False Claims Act deprives a district court of jurisdiction over any qui tam action that is based upon allegations or transactions already disclosed in certain public fora, unless the relator is the original source of the information underlying the action.[5] United States ex rel.

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[5] Title 31 U.S.C. § 3730 (e) (4) (A) states:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, ad-

Foundation Aiding the Elderly v. Horizon West Inc., 265 F.3d 1011, 1013-14 (9th Cir.2001). In analyzing whether a claim is barred under the Act, a court must conduct a two-tiered inquiry. First, the court must determine whether there has been a prior "public disclosure" of the "allegations or transactions" upon which the qui tam suit is based. A-1 Ambulance Serv., Inc. v. California, 202 F.3d 1238, 1243 (9th Cir.2000). Second, only if there has been public disclosure must the court inquire whether the relator is the "original source of the information." Id.

In the June 2004 Order, the Court found that the charges contained in the first amended complaint were based upon allegations already disclosed by the plaintiff in Bly-Magee II. The Court then found that Bly-Magee had not sufficiently shown that she was the original source of the information underlying the charges of fraud. Accordingly, the issue before the Court is whether Bly-Magee's second amended complaint demonstrates that she was the original source. However, in the plaintiff's oppositions to the present motions, Bly-Magee contends that the Court's prior public disclosure analysis was flawed. Since this analysis represents the first step in determining whether the jurisdictional bar is raised, the Court revisits this issue before addressing the original source issue.

1. Public Disclosure

The public disclosure prong requires the court to make two distinct determinations. First, the court must determine whether the public disclosure originated in a source enumerated in the statute. Under 31 U.S.C. § 3730(e)(4)(A), public disclosure can occur (1) in a criminal, civil, or administrative hearing; (2) in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation; or (3) from the

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ministrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

news media. See A-1 Ambulance Serv., 202 F.3d at 1243. If there has been public disclosure through one of these sources, a court must then determine whether the disclosure consisted of "the allegations or transactions" giving rise to the relator's claim. Id. If the allegations or transactions underlying the claim have been previously disclosed in an enumerated forum, there has been "public disclosure" under the statute.

In its June 2004 Order, the Court determined that Bly-Magee had previously disclosed the allegations underlying her claim in a civil suit, Bly-Magee II. The Court found that this constituted public disclosure under the False Claims Act. Bly-Magee urges the Court to revisit this issue claiming that this interpretation contradicts both the plain meaning of the statute and its legislative intent. In essence, she argues that her present action is not "based upon" the allegations raised in Bly-Magee II as that term is used in 31 U.S.C. § 3730(e)(4)(A). Therefore, she concludes, the public disclosure bar is not raised by that earlier suit.

There is some force to the plaintiff's argument. When a litigant brings two suits involving similar allegations it follows that the later suit is not "based upon" the earlier suit, but rather that the two suits are both independently derived from some pre-litigation events. If the plain language of 31 U.S.C. § 3730(e)(4)(A) were controlling, then the Court would be inclined to agree with the plaintiff. Indeed, this is how the Fourth Circuit reads the statute. See United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir.1994) (holding that qui tam plaintiff was not barred by earlier suit involving the same allegations because qui tam action was not "derived from" the public disclosures occasioned by earlier suit). However, the Ninth Circuit has made it clear that "based upon" in that provision does not mean "derived from," but rather it means "same as" or "supported by." United States ex rel. Biddle v. Board of Trustees of Leland, 161 F.3d 533, 536-40 (9th Cir.1998). Thus, so long as the plaintiff's present

action contains allegations that are the same as, or supported by, the allegations found in Bly-Magee II, the Court has no choice but to find that the jurisdictional bar has been raised. Because the Court already reached such a conclusion in its June 2004 Order, the plaintiff's present argument that this bar has not been triggered is unavailing.[6]

2. Original Source

Once the court finds that the allegations underlying the fraud have been publicly disclosed, it only has subject matter jurisdiction over the claim if the relator is the "original source of the information." 31 U.S.C. § 3730(e)(4)(A). The qui tam relator bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. See Alcan Elec., 197 F.3d at 1018. To be an "original source," a plaintiff must have "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B).

To be independent, the relator's knowledge must derive from evidence other than that contained in the public disclosure. Wang v. FMC Corp., 975 F.2d 1412, 1417 (9th Cir.1992). This requirement filters out parasitic suits brought by opportunistic individuals who offer no knowledge of their own but only seek to avail themselves of the Act's generous remedial provisions. It appears that Bly-Magee's knowledge is independent because it preceded the public disclosure in Bly-Magee II. See Alcan Elec., 197 F.3d at 1020. As she argues, she is not a "parasite" of her own previous lawsuit. The remaining jurisdictional issue, then, is whether Bly-Magee has shown in her second amended complaint by a preponderance of the evidence that she has direct knowledge of the alleged fraud.

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[6] The plaintiff's argument that she cannot be a "parasite" of her own previous lawsuit is in conflict with prior Ninth Circuit authority. In United States v. Alcan Elec. and Engineering, Inc., the court in applying Biddle held that a relator's complaint raised the public disclosure bar in his later qui tam action. 197 F.3d 1014 (9th Cir.1999).

A relator has direct knowledge of an alleged fraud when he "discovered the information underlying his allegations of wrongdoing through his own labor." United States ex rel. Devlin v. State of Cal., 84 F.3d 358, 360 (9th Cir. 1996) (footnote omitted). In Wang, the court held that an engineer-relator who had been called in to study a problem had direct knowledge of the problem because "he saw [it] with his own eyes" and his knowledge was "unmediated by anything but [his] own labor." 975 F.2d at 1417. Similarly, in United States ex rel. Barajas v. Northrop Corp., the Ninth Circuit held that an employee of a government subcontractor who had acquired knowledge of falsified testing during the course of his employment by the subcontractor had direct and independent knowledge sufficient to bring a qui tam claim. 5 F.3d 407, 411 (9th Cir.1993).

However, in Devlin, the court held that the relators could not bring a qui tam action because they did not acquire knowledge of the allegations underlying claim firsthand. Rather, they derived the information secondhand through an acquaintance who had first-hand knowledge. 84 F.3d at 361.

The requirement of direct knowledge insures that a relator's information is genuine and valuable. The Senate Report accompanying the 1986 amendment inserting the present version of the jurisdictional bar into the False Claims Act stresses that in order to detect fraud it was necessary to enlist the "cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." S.Rep. No. 345, 99th Cong., 2d Sess. 4. Thus, by introducing the "original source" provision, Congress sought to find the "golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information of their own to contribute." Devlin, 84 F.3d at 362 (quoting United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C.Cir.1994)). It is not enough for Bly-

Magee to show that she is not merely opportunistic; she must also demonstrate that she possesses direct knowledge of the alleged fraud and thus "genuinely valuable information."

In its June 2004 Order, the Court found that Bly-Magee had not alleged facts in her first amended complaint supporting her claim that she has direct knowledge of the allegedly false certifications underlying her claims. The Court reasoned that because the plaintiff's employment with SCRS ended more than four years prior to the allegedly fraudulent certifications by the CDR defendants, her employment did not evince the first-hand acquisition of information about the alleged fraud. The Court also found unconvincing Bly-Magee's statement that she gained direct knowledge of false certifications from her 1995 denial of benefits by the Pasadena CDR office. Left only with an unsupported assertion that she was "the original source" of the allegations, the Court found that Bly-Magee had not met her burden of showing that she had first-hand knowledge of the alleged acts.

The plaintiff's second amended complaint contains scant information about how Bly-Magee came to discover the false certifications. Rather, the plaintiff merely reasserts that she was the former executive director of SCRS; that, after being "forced from her position in 1991," she continued "to write proposals for SCRS and was actively involved with its Board of Directors"; and that after she was denied services in 1995, she "embarked on a two year investigation to determine why there were no funds available for services." (SAC ¶ 26.) These statements do not show that Bly-Magee obtained first-hand knowledge of the false certifications. On the contrary, it is far from obvious to the Court that someone who writes proposals for an independent non-profit organization and was "actively involved" with that organization's board of directors somehow has an "insider's view" of the CDR certifications at issue in this action. Bly-Magee does not describe attending any CDR meetings where fraudulent activity was dis-

cussed or carried forward; nor does she detail the acquisition and auditing of CDR records that would demonstrate first-hand access to the fraudulent activities. Beyond stating generally that she investigated numerous CDR offices in the Los Angeles area, she does not describe a single encounter that she had with CDR, LACOE, or the County that would show her direct knowledge.

This situation is similar to that encountered by the Ninth Circuit in Alcan Elec. There, the relator, a member of an electrical workers union, alleged a fraud committed by electrical contractors. In support of his "original source" status, he declared that his membership in the union gave him a window onto the fraudulent activities. However, the court found this too vague to support a finding that he had direct knowledge under the False Claims Act. 197 F.3d at 1021. Similarly here, without some showing of how Bly-Magee came to learn of the alleged fraud, the Court cannot determine that she acquired the knowledge first-hand.

The assertions added by the plaintiff in her declaration do not change this result. Rather, they merely stand for the unexceptional proposition that the state's rehabilitation program is unable to serve all those who would benefit by its services. While this unfortunate fact may be an effect of the alleged scheme, it does not form a basis for demonstrating that Bly-Magee possesses first-hand knowledge of the specific fraudulent actions, a jurisdictional prerequisite in these sorts of actions.[7]

For these reasons, the Court is inclined to find that the plaintiff has not sufficiently demonstrated that she has

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[7] Bly-Magee's assertion that the defendants "cannot identify one 'second hand source'[] that provided any information to the Relator" is beside the point. (Opp'n at 2.) So is her claim that it "is undisputed that Ms. Bly-Magee is the original source of information." (Id. at 8.) As already mentioned, the burden of establishing subject matter jurisdiction plainly rests with the relator. See Alcan Elec., 197 F.3d at 1018. In such a situation the defendants could remain absolutely silent and still prevail if the relator fails to carry the burden.

direct knowledge of the information on which her allegations are based. It follows that the plaintiff has failed to show that she is an "original source" within the meaning of the False Claims Act. Accordingly, the Court is without jurisdiction over this action, and consideration of the other arguments presented by the defendants is moot.

III. Conclusion

Based on the foregoing considerations, the Court is inclined to grant the movants' motions to dismiss without leave to amend.

IT IS SO ORDERED.

Dated: 12-07-04

/s/ DEAN D. PREGERSON
DEAN D. PREGERSON
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-01-08716 DDP (PJWx)

UNITED STATES EX REL. CHARLOTTE BLY-MAGEE,
Plaintiff,

v.

BRENDA PREMO, ET AL.,
Defendants.

[Mar. 8, 2005]

ORDER DENYING PLAINTIFF'S MOTIONS FOR RECONSIDERATION AND CLARIFICATION

This matter is before the Court on two motions brought by the plaintiff/relator Charlotte Bly-Magee in response to the Court's December 9, 2004 order dismissing the plaintiff's second amended complaint ("SAC") without leave to amend. The plaintiff moves this Court to reconsider and clarify its order pursuant to Fed. R. Civ. P. 59(e). After reviewing the motions and considering the arguments raised therein, the Court adopts the following order.

I. Background

A. Factual Background

In this action, the plaintiff/relator Charlotte Bly-Magee brought suit against multiple defendants for alleged violations of the False Claims Act, 31 U.S.C. §§ 3729, et seq. The plaintiff's charges involved the federal disbursement of funds to state governments pursuant to the Rehabilitation Act, 29 U.S.C. §§ 720, et seq. Each year the federal government distributes to the states grants that are to be used to help provide assistance to persons with disabilities in obtaining gainful employment. The funds are awarded to the states on a per capita basis in the form of a matching grant and in return the state agrees to con-

tribute a share of every grant dollar "drawn down" from its allocation. (SAC ¶ 42.) The California Department of Rehabilitation ("CDR") is the agency designated by the state of California to administer and distribute the federal matching funds, which amount to more than $250 million per year. (Id. ¶ 43.)

The essence of the plaintiff's complaint is that certain individual CDR employees devised a scheme whereby they awarded federal rehabilitation funds to state agencies, local governments, and school districts in return for inflated "paper" contributions that were then fraudulently certified to the federal government as the state's matching share.[1] (Id. ¶ 44.) The alleged purpose of this scheme was to obtain the maximum federal allocation of rehabilitation funds in order to divert state funds to facilitate an enlarged bureaucracy. (Id. ¶ 47.) The plaintiff alleged that the recipients of the federal funds, such as the defendants Los Angeles County Office of Education ("LACOE") and the County of Los Angeles ("County"), willingly participated in this "shell game" in order to garner the federal subsidies without having to actually improve or enlarge services to individuals with disabilities. (Id. ¶ 50.)

The plaintiff asserts that she gained knowledge of the false certifications during and following her employment as the executive director of Southern California Rehabilitation Services ("SCRS"), a non-profit agency that received federal and state rehabilitation funds. (Id. ¶ 26.) The plaintiff alleges that she was forced from her position in 1991 after uncovering evidence of the theft of millions of dollars of equipment by state employees. (Id.) She claims that, after her termination, she continued to work with SCRS. (Id.) The plaintiff also alleges that she further acquired knowledge of the alleged fraud when she

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[1] The plaintiff names ten CDR employees as defendants: Brenda Premo ("Premo"), Catherine Campisi ("Campisi"), Melinda Wilson, Jim Kay, Warren Hayes, Keith Foster, Lana Frasier, Edna Larsen, Kenneth Smedberg, and Verne Albright (collectively "the CDR defendants").

was denied services as a disabled individual in 1995 by the Pasadena CDR office. (Id.) This denial, based on an order of selection issued by defendant Premo, prompted the plaintiff to embark on a two year investigation of CDR that led her to uncover the alleged fraud. (Id.)

B. Procedural Background

The plaintiff has brought a series of False Claims Act cases in federal court. In 1992, Bly-Magee filed Case No. CV 92-0403 RJK ("Bly-Magee I") in the Central District of California alleging that the CDR and its employees (1) misappropriated equipment purchased for use under Department of Education rules, (2) made misrepresentations regarding the inventory and use of equipment, and (3) did not submit contracts for bid. The government declined to intervene. In February 1995, the court granted the defendants' motion for summary judgment. The plaintiff did not appeal.

In 1997, the plaintiff brought a second False Claims Act case in the Central District of California, Case No. CV 97-4101 MRP ("Bly-Magee II") against, *inter alia*, certain CDR employees (many of whom are defendants in the instant suit). The government declined to intervene. The third amended complaint is still pending before Judge Kelleher in the Central District.

On October 10, 2001, Bly-Magee filed the instant suit ("Bly-Magee III").[2] On April 12, 2004, the Court issued an order granting LACOE's and the County's motion to dismiss the first amended complaint on the basis that the allegations contained therein lacked specificity under Fed. R. Civ. P. 9(b). In a June 2004 order, the Court granted the CDR defendants' motion to dismiss because the Court found that it was deprived of subject matter jurisdiction under the jurisdictional bar provision of the False Claims

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[2] Plaintiff originally named the Los Angeles Unified School District ("LAUSD") as a defendant in this suit. In March 2004, the Court granted LAUSD's motion to dismiss because, as a state agency, LAUSD cannot be sued as a "person" under the False Claims Act.

Act, 31 U.S.C. § 3730(e)(4)(A). In both instances, the Court granted Bly-Magee leave to amend so that she might cure the specificity and jurisdictional defects.

Bly-Magee filed a second amended complaint on August 2, 2004. The defendants brought motions to dismiss, which the Court granted in its December 9, 2004 order. In that order, the Court first considered whether the second amended complaint cured the jurisdictional defects found in her first amended complaint. At the plaintiff's urging, the Court revisited the "public disclosure" prong of the jurisdictional test and confirmed its previous finding that the allegations raised in her complaint were previously disclosed in Bly-Magee II. See 31 U.S.C. § 3730(e)(4)(A); United States ex rel. Biddle v. Board of Trustees of Leland, 161 F.3d 533, 536-40 (9th Cir. 1998).

Next, the Court turned to the question of whether Bly-Magee qualified as an "original source" under 31 U.S.C. § 3730(e)(4)(A). To be an original source, a plaintiff must show by a preponderance of the evidence that she has both "direct and independent knowledge" of the fraudulent acts. While the Court found that Bly-Magee had shown that her knowledge was independent of the previous disclosure, it concluded that she had failed to show that she had direct knowledge of the alleged fraud. Accordingly, Bly-Magee had failed to show that she qualified as an original source, and the Court dismissed the case for lack of jurisdiction. Because the plaintiff had already been given numerous opportunities to prove jurisdiction, the Court dismissed her claim without leave to amend.

The plaintiff now brings the instant motions for reconsideration and clarification pursuant to Fed. R. Civ. P. 59 (e).

II. Discussion

A. Standard for Reconsideration Under Fed. R. Civ. P. 59(e)

Rule 59(e) permits a party to file a motion to alter or amend a judgment. The contours of this rule extend to

both motions for reconsideration, Kona Enterprises v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000), and motions for clarification, Barry v. Bowen, 825 F.2d 1324, 1328 (9th Cir. 1987). Relief under Rule 59(e) is an extraordinary remedy, one that "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." 389 Orange Street Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

B. Reconsideration is not Warranted

In her motion for reconsideration, Bly-Magee asks the Court to reconsider its decision to dismiss her complaint *without leave to amend.* She offers neither new evidence nor new law. Rather, the plaintiff argues that the Court committed clear error by failing to grant leave to amend. The plaintiff points out that Fed. R. Civ. P. 15(a) requires district courts to freely grant leave to amend "when justice so requires." She also argues that her suit should not be dismissed on a mere technicality, but rather it should be decided on the merits.

The Court finds that reconsideration is not warranted here. While Bly-Magee offers to present new evidence that would permit her to overcome the False Claims Act's jurisdictional bar, she has already had numerous opportunities to show that she was the original source of the allegations. In this case, she has filed three complaints, none of which were sufficient to permit the case to move beyond the pleading stage. After her first amended complaint was dismissed, Bly-Magee was on notice that she had to show by her allegations that she satisfied the "original source" requirement of the jurisdictional bar. Neither the allegations made in her second amended complaint nor those found in her opposition to the defendants' motions to dismiss provided a sufficient showing that she had direct knowledge of the alleged fraud.

Underlying the Federal Rules of Civil Procedure is a clear policy favoring the granting of leave to amend in or-

der that a claim not be dismissed on a technicality. However, leave should not be "freely given" where the plaintiff has repeatedly failed to cure deficiencies by amendments previously allowed. Foman v. Davis, 371 U.S. 178, 182 (1962). Here, despite numerous opportunities, Bly-Magee has failed to show that this Court has jurisdiction to hear her claim. The Court finds that it did not commit clear error when it dismissed the plaintiff's second amended complaint without prejudice. Thus, it denies her motion for reconsideration.

C. The Plaintiff's Motion for Clarification

In her second motion, Bly-Magee purports to seek clarification of the Court's December 9, 2004 order. However, upon review of the seven "issues" contained in her motion, the Court does not find any request for clarification of ambiguities contained in its judgment. Rather, it appears that the plaintiff seeks to draw the Court into reconsidering arguments it already weighed. This is not a proper use of a Rule 59(e) motion. See Keweenaw Bay Indian Community v. State of Mich., 152 F.R.D. 562, 563 (W.D.Mich. 1992) (Rule 59(e) motion "not intended to be utilized to relitigate issues previously considered"). The proper vehicle for the plaintiff's argument is an appeal. Accordingly, the Court denies the motion for clarification.

III. Conclusion

IT IS SO ORDERED.

Dated: 3-8-05

/s/ DEAN D. PREGERSON
DEAN D. PREGERSON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55556

(D.C. No. CV-01-08716-DDP
Central District of California, Los Angeles)

UNITED STATES EX REL. CHARLOTTE RAE BLY-MAGEE,
Plaintiff-Appellant,

v.

BRENDA PREMO, ET AL.,
Defendants-Appellees.

[Filed January 11, 2007]

ORDER

Before: CANBY, NOONAN, and BERZON, Circuit Judges.

The petition for panel rehearing is DENIED.

STATUTORY PROVISIONS INVOLVED

The False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, provides:

31 U.S.C. § 3729. False claims

(a) Liability for Certain Acts.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and Knowingly Defined.—For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim Defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption From Disclosure.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by Private Persons.—**(1)** A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the Parties to Qui Tam Actions.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate rem-

edy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam Plaintiff.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus rea-

sonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain Actions Barred.—**(1)** No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government Not Liable for Certain Expenses.—The Government is not liable for expenses

which a person incurs in bringing an action under this section.

(g) Fees and Expenses to Prevailing Defendant.— In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

(2)

No. 06-1269

Supreme Court, U.S.
FILED
APR 17 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

UNITED STATES EX REL. CHARLOTTE BLY-MAGEE,

Petitioner,

v.

BRENDA PREMO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Under the "public disclosure bar" of the False Claims Act, 31 U.S.C. §3730(e)(4)(A), a court lacks jurisdiction over a *Qui Tam* action based on the "public disclosure of allegations or transactions" within a "government accounting office report, hearing, audit or investigation." Do the terms "audit" or "report" encompass a broadly distributed, published audit report by the State Auditor of the State of California?[1]

[1] The issue framed by Petitioner purports to encompass "local" agencies – an issue raised nowhere in the case at bar.

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INTRODUCTION

For over a decade, Petitioner, Charlotte Bly-Magee, has been fruitlessly crusading upon essentially the same general set of issues against various parties for similar perceived improprieties. This Petition relates to the third such action filed by Petitioner.

The Petition for Writ of Certiorari should be denied for several reasons. First, the Bly-Magee case is not final. No final judgment has been entered as to any party in the matter rendering the case unripe for review and creating the serious possibility that a decision by this Court would be rendered moot on other grounds. Second, despite the effort of Petitioner to create the illusion of a split in authority, Petitioner's reliance upon a decade old decision by one Circuit does not create grounds for review because that case has since been distinguished by the very Circuit that issued it and all but repudiated by this Court. Third, subsequent decisions in several Circuits demonstrate a *trend*, now joined by the Ninth Circuit in this case, in a developing area of law – not an area of conflict and confusion for Supreme Court resolution. The Court should permit this development in the law to take its natural course.

Fourth, even were there any serious question as to the proper application of the statute, it would be inappropriate for the Court to legislate the contents of the statute by adding terms and provisions not included in the statute. Last, the Ninth Circuit's determinations in the case at bar were fundamentally sound and consistent with both the intent of the law and extensive authority in both the Ninth Circuit and around the country.

THE DECISION OF THE NINTH CIRCUIT IS NOT A FINAL JUDGMENT PROPER FOR CONSIDERATION BY THIS COURT

In the matter at bar, the Ninth Circuit affirmed *only a portion of the dismissal* of the action by the District Court and *remanded* the matter to the District Court for further consideration of other possible infirmities of the complaint as to which, according to the Ninth Circuit's reasoning, the District Court had jurisdiction to rule. Hence the matter of *Bly-Magee v. Premo,* upon which this Petition rests, is potentially months, if not years, from being final.

While there is no hard and fast rule requiring absolute finality before this Court takes a case, appellate courts wisely are traditionally reluctant to consider appeals where the underlying action is not final.[2] Petitioner makes little effort to bring this matter within any recognized exception to common practice and effectively ignores the fact that the matter is far from being final. However, there are several reasons this Court should decline interlocutory review in this matter.

A portion of the case was remanded by the Ninth Circuit for consideration by the District Court of pleading infirmities which actually pervade the entire complaint. Rulings upon those infirmities in Defendants' favor, likely to occur long before this Court could hear this matter even if it were so inclined would render any decision by this Court moot since such pleading deficiencies pertain to the

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[2] This court's jurisdiction on such matters is entirely discretionary (28 U.S.C. §1254). *Cf.* 28 U.S.C. §1257 [only "final judgments" from state courts subject to review]; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) [limitations in 28 U.S.C. §1291 militate against interlocutory appeals].

entire complaint and the court's dismissal of *Bly-Magee III* could ultimately be sustained on completely different grounds.

A ruling in favor of Defendants upon pleading motions which would ultimately dispose of the lawsuit by Bly-Magee would render any opinion by this Court merely advisory inasmuch as the underlying action itself would have been fully dismissed upon other grounds.

A lack of clarity as to the final outcome of litigation has led this Court to dismiss other interlocutory grants of Certiorari as improvident (See, *Nike Inc. et al. v. Kasky*, 539 U.S. 654 (2002) [dismissing Certioriari as having been improvidently granted in the context of a California Supreme Court decision remanding a case for further consideration by the trial court]). Respectfully, therefore, this Court's discretion to consider this matter which is not "final" in any sense, should not be exercised in this matter.

DUNLEAVY DOES NOT CREATE A DISPUTE AMONG THE CIRCUITS BECAUSE ITS RULING IS DATED AND NO LONGER VIABLE

The Petition is premised almost entirely upon a purported dispute or disparity between a single decision by the Third Circuit on one end and the *admittedly consistent* rulings of several other Circuits including the Ninth Circuit (in multiple matters) on the other. The issue at bar is the interpretation of the "prior public disclosure" bar of the False Claims Act.

31 U.S.C. §3730(e)(4)(A) provides as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of

> allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

The genesis of Petitioner's argument for the existence of a split, is the matter of *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3rd Cir. 1997 – *Dunleavy I*). The gravamen in *Dunleavy I* was the question of whether a standard annual report prepared by the County, or prior newspaper accounts of certain conduct which was alleged to have constituted a violation of the False Claims Act, could trigger the prior public disclosure bar of the False Claims Act. In reaching its decision that it did not, the *Dunleavy* court made several assumptions or decisions which time and further development in the law have shown are wrong.

The first error by the Third Circuit in *Dunleavy I* is the Court's assumption that only actual prior allegations of fraudulent activity would qualify as prior public disclosure under the prior disclosure bar. This suggests a far too narrow reading of the statute and a predisposition to its ultimate holding. The position that actual allegations of fraud are necessary to trigger the bar has since been eroded in favor of holdings, more consistent with the intent of the statute, that it is the publication of *facts* from which fraudulent activity could be divined, rather than actual publication of allegations of fraud, which trigger the bar (See, e.g., *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 335 (6th Cir. 1998) (adopting broad interpretation of "based upon" and holding that

the relator's lawsuit was "based upon" an earlier state court action, although the basis for her *Qui Tam* lawsuit was her personal knowledge, because all that is required to trigger the bar is that the allegations or transactions in a complaint mirror the information in the public domain and not that the relator actually derive her information from the public information).[3] Even the Third Circuit which issued *Dunleavy,* has now apparently abandoned this very narrow interpretation (*United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 385-88 (3rd Cir. 1999), *cert. denied*, 120 S.Ct. 1418 (2000) [adopting the majority broad view of the phrase "based on" for prior public disclosure purposes]).

In the context of this narrow reading, the Court in *Dunleavy* found that the only documents which contained sufficient "disclosure of the allegations or transactions" was a (very minor) annual County report. The Third Circuit then without careful analysis and based upon speculative assumptions respecting the final disposition of the county report, concluded that such a report, being a standard annual report, submitted by every recipient of public funds and *likely to be hidden away in a file drawer rather than reviewed carefully*, could not be "the type" of a governmental report intended by Congress to foreclose a

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[3] See also, *United States v. Board of Trustees of Stanford Univ.*, 161 F.3d 533 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1457 (1999); *United States ex rel. McKenzie v. BellSouth Telecomms. Inc.*, 123 F.3d 935, 940 (6th Cir. 1997), *cert. denied*, 522 U.S. 1077 (1998); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), *cert. denied*, 522 U.S. 865 (1997); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2nd Cir. 1992); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 552 (10th Cir.), *cert. denied*, 507 U.S. 951 (1993); *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 at 567 (11th Cir. 1994).

Qui Tam action.[4] It appears therefore that the holding in *Dunleavy I* is a result driven opinion in which the Court, without adherence to the language of the statute, narrowly interpolated the code to achieve what it considered a "proper" result.

In light of the questionable rulings throughout the history of *Dunleavy*, it is necessary to question whether this is simply a case that the Third Circuit "got wrong."[5] In essence, this Petition is premised upon a decade old case, of questionable relevance, to attempt to establish the existence of a conflict amongst the Circuits.

SINCE ITS HOLDING IN *DUNLEAVY I*, THE THIRD CIRCUIT HAS JOINED THE TREND WITH OTHER CIRCUITS IN ADDRESSING THE BREADTH OF THE PRIOR DISCLOSURE BAR

Petitioner inexplicably cites two post 1997 instances in which Petitioner posits the Third Circuit "reaffirmed"

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[4] The Court observed in Fn. 11: There is no evidence that, prior to Dunleavy's filing of his Complaint, the federal government had done anything more than place this information, along with countless other reams of paper, in some government file room. This somewhat cynical view of federal record keeping appears to have driven the final outcome of the decision.

[5] Upon remand of *Dunleavy I* to the District Court, the County moved to dismiss the matter upon the theory that the County was not a "person" under the auspices of the False Claims Act. The District Court *again* dismissed the matter on this ground. The Third Circuit then reconsidered the case in *Dunleavy v. County of Delaware*, 279 F.3d 219 (3rd Cir. 2002 – *Dunleavy II*) *affirming* the District Court's dismissal of the matter on that ground. However, this court, in *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003) ruled directly opposite to this holding calling into serious question *any* continuing viability of the *Dunleavy* cases.

its adherence to *Dunleavy I*. While such adherence might be plausibly explained as misguided fealty to that Circuit's prior holdings, it is not necessary to do so as ***in both instances, the Third Circuit distinguished Dunleavy I and in both instances dismissed the cases under review based upon the prior disclosure bar.***

In *United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*, 186 F.3d 376 (3rd Cir. 1998), cited by Petitioner as evidence of the continuing viability of *Dunleavy*, the Third Circuit paid lip service to *Dunleavy* in holding that the product of a request under the Freedom of Information Act (FOIA) – itself a source of prior public disclosure that is mentioned nowhere in the False Claims Act, was a "report" as defined in the statute and thus a prior public disclosure of the information which thereupon led to the filing of a *Qui Tam* action.

Remarkably, after its having so improbably parsed the language of the statute in *Dunleavy*, the Third Circuit in *Mistick* decided that the language of the statute was ambiguous but that "In light of this apparent lack of precision, we are hesitant to attach too much significance to a fine parsing of the syntax of §3730(e)(4)(A)" (186 F.3d 376, 388). The Third Circuit's continued adherence to *Dunleavy* is questionable at best.

Petitioner's citation of, and reliance upon, *United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 473 F.3d 506 (3rd Cir. 2007) to suggest any continuing viability of *Dunleavy I* is even less explicable. There, the Third Circuit affirmed dismissal of the *Qui Tam* action based upon the prior publication bar dismissively relegating the discussion of *Dunleavy* to the "rubric of *Dunleavy*."

Petitioner's commentary upon the Tenth Circuit's decade old decision in *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996) exemplifies the difficulty in finding cases which concur with *Dunleavy*. There, the Court *never reached* the issue at bar. It merely commented on the fact that the Appellant there never raised that issue for determination. This is hardly a "ringing endorsement" of *Dunleavy* sufficient to justify the conclusion that the Tenth Circuit is in conflict with the remainder of the country.

In fact, Petitioner cites neither Third Circuit nor any other Circuit authority that has actually applied *Dunleavy I* in any manner that would be inconsistent with the determination of the Ninth Circuit in *Bly-Magee*. Even the Third Circuit has construed the bar more liberally, consistent with the decision in *Bly-Magee* at times. For example in *United States ex rel. Stinson, Lyons Gerlin & Bustamante P.A. v. Prudential Insurance Company*, 944 F.2d 1149 (3rd Cir. 1991) the Third Circuit held that disclosure within the context of a state litigation not involving the Federal Government, could constitute prior public disclosure.

In 2005, the very circuit that issued *Dunleavy*, held in *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3rd Cir. 2005) that the prior filing of a civil complaint in state court constituted a source of prior public disclosure:

> These two characteristics [applicable to litigation and pleadings], filing with the court and public availability would persuade even those in

disagreement with *Stinson* that a complaint is a public disclosure under the FCA.[6]

If there is any meaningful distinction between the "public disclosure" arising from pleadings in a state court litigation file at the local county courthouse and an audit report issued and widely published by the highest ranking financial officer of the most populous state in the country, it would certainly seem that the latter is better calculated to give meaningful notice to federal authorities than the former. Yet it is the former with which Petitioner takes no issue and the latter which is the subject of this challenge.

The same rationale and reasoning underlies the Ninth Circuit's decision in *Bly-Magee*, its decisions in other cases of similar nature and the decisions in other Circuits all consistently applying the same principles as are further discussed below.

THERE IS NO CONFLICT BUT ONLY A PROGRESSIVE AND ONGOING TREND IN THE LAW WHICH DOES NOT INVITE SUPREME COURT CONSIDERATION

Contrary to Petitioner's assertion of conflict, a review of case law in the area shows a progressive, consistent, and ongoing trend among the Circuits to interpret the prior disclosure bar consistently with its intent. That intent was well stated by the Third Circuit itself in *Stinson, supra*, where the Court observed:

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[6] The Third Circuit quoted Justice Scalia's dissent in *Stinson* observing "that information gleaned from browsing through public court files would constitute a public disclosure" (*Stinson*, 944 F.2d 1149, 1170-71).

> The provision was designed to preclude *Qui Tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator.

The Seventh Circuit noted in *United States ex rel. Matthews v. Bank of Farmington*, 166 F.3d 853, 857-58 (7th Cir. 1999):

> Among the congressional aims of the FCA and the 1986 amendments was "to reward private individuals who take significant personal risks to bring wrongdoing to light, to break conspiracies of silence among employees of malfeasors, and to encourage whistleblowing and disclosure of fraud. While Congress intended the 1986 amendments to continue to encourage whistleblowers to come forward with information, it also intended to prevent opportunistic and parasitic lawsuits.

This Court has consistently declined to review these decisions applying the FCA prior publication bar consistently with *Bly-Magee*. Nothing in the Petition suggests grounds for a different perspective in this matter.

Beyond the cases from the Third Circuit noted above demonstrating an abandonment of any strict application of *Dunleavy* by the very Circuit that issued the opinion, there is a progressive, consistent and ongoing trend in the law to apply the prior publication bar to include state and/or local government reports and disclosures as prior public disclosure sufficient to trigger the bar.

The examples cited in the Petition (*Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003), *cert. denied*, 540 U.S. 877, 124 S.Ct. 277, 157 L.Ed.2d 139 (2003) and *Battle v. Board of Regents*, 468 F.3d 755 (11th Cir. 2006)) clearly represent

the current trend in the law. In *Hays*, the Eighth Circuit held that a state audit report, indistinguishable from the audit that is at issue in *Bly-Magee*, was a previous public disclosure sufficient to bar a *Qui Tam* action based upon transactions disclosed in the report. This Court recently cited *Hays* favorably in *Rockwell International Corp. v. United States*, (Docket 05-1272) ___ U.S. ___ (March 27, 2007) (See Opn. p. 18).

The Ninth Circuit's decisions in this area have been particularly consistent and this Court has consistently declined review (though for some reason Petitioner seems reluctant to include citation to the denial of Certiorari). For example in *A-1 Ambulance Service Inc. v. California*, 202 F.3d 1238 (9th Cir. 2000), *cert. denied*, 529 U.S. 1099, 120 S.Ct. 1833, 146 L.Ed.2d 777 (2000), this Court let stand a decision in which the prior disclosure bar was applied to public hearings at a County Board of Supervisors at which the circumstances underlying a later *Qui Tam* action were discussed.

The Ninth Circuit noted there:

> We further reject A-1's contention that administrative hearings must be federal in order for the public disclosure bar to apply. The unambiguous text of the first category of public fora described in §3730(e)(4)(A) does not contain any federal limitation. Congress could have easily limited the public disclosure bar to "federal criminal, civil, or administrative hearings," but chose not to do so. If the statutory language is clear, that is the end of our inquiry. See *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). We will not add a term to the statute that Congress elected not to include.

The Fifth Circuit likewise has developed a liberal construction of the prior publication bar, holding in *U.S. ex rel. Reagan v. East Texas Medical Center etc.*, 384 F.3d 168 (5th Cir. 2004) that the previous allegations of similar facts by the relator in her prior state lawsuit against the Defendant and information gained in a FOIA request constituted a prior publication sufficient to trigger the bar.

The Court in the instant case merely continued this same line of reasoning to enforce the intent of the legislature. Again, these prior decisions created no conflict worthy of review. Their continued consistent application, does not justify review here.

EVEN WERE THERE SOME QUESTION IN THE INTERPRETATION OF THE STATUTE, CLARIFICATION SHOULD BE MADE BY THE LEGISLATURE NOT THE COURTS

While it is clearly the province of the Court to *interpret* the laws consistently with the patent intent of the Legislature, it is *not* properly the province of the Court to rewrite a statute to encompass limitations which the legislature itself did not consider necessary or proper. The simplicity of the issue at bar suggests that the Court should decline to do so here. The Ninth Circuit noted in *Seal v. Seal A.*, 255 F.3d 1154 (9th Cir. 2001), *cert. denied*, *U.S. ex rel. Gale v. Zenith Data Systems*, 535 U.S. 1017, 122 S.Ct. 1605, 152 L.Ed.2d 620 (2002):

> If a legislative purpose is expressed in plain and unambiguous language, . . . the . . . duty of the courts is to give it effect according to its terms. Exceptions to clearly delineated statutes will be implied only where essential to prevent absurd results or consequences obviously at variance

> with the policy of the enactment as a whole . . . One of the policy goals behind the [1986] amendments was to "reject[] suits [that] the government is capable of pursuing itself, while promoting those [that] the government is not equipped to bring on its own.

The statute contains a listing of potential sources of prior public disclosure which will trigger the jurisdictional bar. No great feats of legislative legerdemain would have been necessary to compose a limitation upon this listing had the legislature so intended. Congress elected to utilize the phrase "Government Accounting Office" as one of the listed sources of reports or audits for determining the existence of a public disclosure. The Third Circuit called attention to this language in *Mistick, supra* parsing this language (contrary to its own stated intent to avoid doing so) and arguing, in dicta, that it was "ambiguous" because Congress elected to use the term "Government" Accounting Office rather than "General" Accounting office – the latter being more readily discerned as relating exclusively to the Federal Government.

Respectfully, this dictum purports to find ambiguity where none exists. In fact, the intent of the 1986 Amendments (to avoid opportunistic and parasitic suits) is unquestionably well served by the assumption that Congress meant exactly what it said in the statute – that any *Government* audit or report could contain information which could trigger the prior disclosure bar.

Had it been in the contemplation of the legislature to constrain those sources to encompass *only* federal sources of information, *the addition of that single word "federal" would have sufficed to clearly and succinctly spell out such intention*. Alternatively, simply using the term "General"

Accounting Office could have satisfied the same end (See *Mistick, supra*). That Congress omitted so simplistic a limitation cannot be read as license for the judiciary to add language to a statute which the legislature itself could so easily have done had it wished to do so.

This Court recently declined just such an "invitation" in *Rockwell, supra* (issued March 27, 2007) in which this Court declined to rewrite the "Original Source" saving provision of the prior disclosure bar by placing a judicial gloss upon the language used by Congress. Likewise, there is no compelling reason here for any such reconstruction of the immediately preceding paragraph of the very same statute.

Nor can it be presumed that Congress is oblivious or insensitive to the clear trend of the Federal Courts. Had Congress found fault with these interpretations, it could readily have addressed the situation in the decade since *Dunleavy*. That it has elected not to do so should not encourage the judiciary to take up the cause and rewrite the statute for the legislature.

THE NINTH CIRCUIT'S DETERMINATIONS IN *BLY-MAGEE* WERE SUBSTANTIVELY CORRECT

A. The Decision in *Bly-Magee* is Equally Supportable Without Reference to the State Audit

In considering whether this matter warrants review, and putting aside the fact that there exists no final judgment in this matter to review, the Court should not lose sight of the unchallenged alternative basis articulated by the Court in this matter for determining the existence of the jurisdictional bar. Specifically, the Ninth Circuit also recognized that the prior publication of the principle

claims and allegations of *Bly-Magee III* occurred in *Bly-Magee II* and that the relator had failed to establish she was the original source of those facts (App. 3a-4a).[7] In fact, these circumstances are all but indistinguishable from *ex rel. Reagan, supra* where such prior publication in the relator's own previous lawsuit, barred the subsequent action "based upon" those same facts and allegations.

Although the Ninth Circuit's ruling in this respect was limited to only one year of "overlap" between allegations of *Bly-Magee II* and *Bly-Magee III,* the Ninth Circuit apparently did not consider the significant case law holding that even *partial* disclosure will bar a parasitic *Qui Tam* action like *Bly-Magee III* (*U.S. ex rel. Biddle v. Board of Trustees of Stanford*, 161 F.3d 533, 536-40 (9th Cir. 1998); *U.S. ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538 (10th Cir. 1996); *U.S. ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992)). Hence, though it elected not to base its decision solely upon this ground, the Ninth Circuit's holding finding a prior public disclosure and thus a jurisdictional bar is equally sustainable on this ground alone.

B. The Decision in This Case Was Correct

Although there is no real reason for this Court to even consider substantive review in this matter, Respondents are obliged to point out that the substance and reasoning of the decision by the Ninth Circuit are unassailable and

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[7] *Bly-Magee II* was dismissed by the District Court *inter alia* for failure to state a claim under FRCP Rule 9(b). *Bly-Magee II* and *Bly-Magee III* were consolidated for oral argument before the Circuit Court which ultimately affirmed the dismissal of *Bly-Magee II* in an unpublished Memorandum Opinion.

the pos[illegible] urged by Petitioner would engender absurd results.

As pointed out above, there appears to be unchallenged consistency amongst the Circuits that disclosures in state court pleadings clearly constitute a valid basis for the jurisdictional bar to apply. Justice Scalia's concession in *Stinson, supra* that such material would constitute a public disclosure further validates this conclusion.

On February 10, 2000, the Office of the State Auditor of the State of California, under the signature of then Acting State Auditor, Mary Noble, published and delivered to the Governor of the State and its people a complete audit report respecting the State Department of Rehabilitation's administration of the Vocational Rehabilitation Program (which is the subject of relator's action). This report was made available *free* to any member of the public. It was also published on the World Wide Web at www.bsa.ca.gov/bsa/. The Audit report clearly disclosed the very transactions and circumstances upon which the *Qui Tam* action by Bly-Magee (in *Bly-Magee III*) was premised. The Report, comprising over seventy pages, comprehensively addressed the methods, manner and processes in which Respondents herein engaged to administer the subject program – including the cooperative agreements which are particularly at issue in *Bly-Magee III*.

There is no principled distinction which could support the proposition that a state court pleading, filed in the local county courthouse fulfills the legislative intent behind the jurisdictional bar – to assure knowledge of possible fraud by federal authorities, but a widely distributed, broad-ranging audit of public funds by the highest

ranking financial officer in the State of California information is not.[8]

Petitioner offers a strained argument to judicially legislate the content of the statute by adding limiting terms omitted by Congress, but makes no effort to explain *why* such extraordinary interpolation is necessary or appropriate, particularly given the authority (even in the Third Circuit) holding such disclosures as state litigation, FOIA requests and even county supervisorial hearings effect the intent of Congress and constitute sufficient prior publication to impose the bar.

Respectfully, the interpretation urged by Petitioner would result in the absurd and anomalous state of the law in which of a body of respected (and unchallenged) authority holds that the congressional intent to avoid opportunistic and parasitic claims is served by a partial if not complete public disclosure of the facts in such fora as a state law complaint filed in a local courthouse or local agency administrative hearings. However, that a widely published, easily accessible and readily available audit by the State Auditor of the State of California specifically disclosing the very transactions upon which a subsequent *Qui Tam* action is based would not serve that same intent. Given the absence of clear language so stating or drafting history which compels this irrational distinction, this Court should not voluntarily create it.

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[8] This is particularly cogent here where the Second Amended Complaint in *Bly-Magee III* alleges that relator gained her knowledge by "investigation" nearly a decade after her last position with any agency affiliated with the State of California (App. 13a).

The determination by the Ninth Circuit of the proper means to fulfill the legitimate and plainly distinguishable intent of the Legislature is correct and unassailable. It should not be disturbed by further review.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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April 17, 2007

FILED
JAN 2 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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(4)

No. 06-1269

IN THE
Supreme Court of the United States

UNITED STATES EX REL. CHARLOTTE BLY-MAGEE,
Petitioner,

v.

BRENDA PREMO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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The Solicitor General agrees with petitioner that the Ninth Circuit's interpretation of the False Claims Act's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A), is "erroneous" (SG Br. 7) and that the court's construction of that provision "conflicts with the Third Circuit's decision in *Dunleavy*" (*id.*). The Solicitor General also acknowledges that the Eighth and Eleventh Circuits have adopted the same mistaken interpretation of the statute. *See id.* at 16. Finally, the Solicitor General concedes that the Third Circuit has recently indicated its continued adherence to the conflicting (and correct) interpretation. *See id.* Nevertheless, the government recommends against certiorari because the circuit conflict conceivably could resolve itself and because the district court might ultimately rule against petitioner on the merits of her claims. *See id.* at 7, 18-20.

Neither of those remote possibilities provides sufficient reason for this Court to deny certiorari. This case presents the Court with a timely opportunity to resolve a clear and sustained conflict among the courts of appeals on the proper interpretation of a jurisdictional provision of an important federal statute. And that question — whether the public disclosure bar of the False Claims Act applies to disclosures in non-federal administrative reports — is cleanly presented in this case; neither the government nor respondents have identified any threshold issue that could prevent this Court from resolving the issue in this appeal. Accordingly, the reservations offered by the Solicitor General should not deter this Court from granting review of this case to ensure the uniform, and correct, interpretation of the False Claims Act's public disclosure bar.

ARGUMENT

A. The Solicitor General Agrees That A Circuit Conflict Exists On The Question Presented

The decision below deepens a sustained conflict among the courts of appeals concerning an important question of federal statutory law. The "public disclosure" provision of the False Claims Act imposes a jurisdictional bar to actions based on allegations publicly disclosed in "a congressional, administrative, or [GAO] report, hearing, audit or investigation." 31 U.S.C. § 3730(e)(4)(A). The Ninth Circuit interpreted this provision as barring actions based on allegations disclosed in not only federal, but also *state* reports. The Eighth and Eleventh Circuits have adopted the same interpretation. *See Hays v. Hoffman*, 325 F.3d 982, 989 (8th Cir. 2003); *Battle v. Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006). The Third Circuit, however, has interpreted this provision as referring only to disclosures made in federal reports. *See United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997). The government acknowledges this conflict and carefully explains why respondents are wrong to suggest that the conflict may be in the process of resolving itself. *See* SG Br. 16 ("Although the Third Circuit in more recent cases has distinguished *Dunleavy* on various grounds, *none of those decisions suggests disapproval of the Dunleavy court's construction of [§ 3730(e)(4)(A)].*") (emphasis added). Thus, the Solicitor General confirms that this case presents a clear and continuing conflict on the interpretation of a jurisdictional provision of an important federal statute. *See also* Pet. 9-15.

B. The Solicitor General Agrees That The Ninth Circuit Incorrectly Resolved The Question Presented

The decision below is incorrect. *See* Pet. 18-22. The government discusses the errors in the Ninth Circuit's interpretation of § 3730(e)(4)(A) in considerable detail, explaining that the lower court's statutory construction conflicts with the text, structure, and history of the False Claims Act's public disclosure bar. *See* SG Br. 7-15. That mistaken interpretation of the False Claims Act is now the law of the land in three federal circuits — the Eighth, Ninth, and Eleventh Circuits — as the government also acknowledges. *See id.* at 16. Thus, within those circuits, a rule of law that is (as the government admits) erroneous precludes *qui tam* relators from pursuing claims that Congress intended them to bring on the United States' behalf. As the government explains, the interpretation of the public disclosure bar that the Eighth, Ninth, and Eleventh Circuits have adopted substantially undermines the "twin goals of Section 3730(e)(4)(A) — *i.e.*, precluding *qui tam* actions when the government is already publicly looking into the relevant allegations and can prosecute its own suit, while promoting suits alleging possible fraud that the federal government is not publicly pursuing or may even be unaware of." SG Br. 13-14 (citation and internal quotation marks omitted).

C. The Solicitor General's Reservations Provide No Reason To Deny Certiorari

1. As an initial matter, the government's suggestion that the Third Circuit's post-*Dunleavy* decisions provide some reason for this Court to "await further development of the issue in the lower courts" (SG Br.

18) is unpersuasive. The circuit conflict could resolve itself without this Court's intervention only if the Third Circuit abandoned its original — and *correct* — interpretation of the public disclosure bar and adopted the *incorrect* interpretation of the Eighth, Ninth, and Eleventh Circuits. That possibility — however remote — provides no basis for denying the petition, for two reasons. First, the Third Circuit shows no signs of reversing course. As the government acknowledges (SG Br. 16), none of the Third Circuit's recent decisions interpreting the public disclosure bar has cast any doubt on *Dunleavy*, even though intervening decisions of other circuits had specifically disagreed with *Dunleavy*'s approach. *See also* Pet. 11-12. Second, this Court should not deny certiorari based on the theoretical possibility that the circuits might adopt a uniform, erroneous interpretation of a statute that (as the Department of Justice elsewhere has stated) serves as the "primary weapon to fight fraud" against the federal government. Press Release, U.S. Dep't of Justice, Justice Department Recovers Record $3.1 Billion in Fraud and False Claims in Fiscal Year 2006 (Nov. 21, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html.

Moreover, further percolation is extraordinarily unlikely to lead the other circuits to alter their positions, and the government does not suggest that they might. The majority circuits in this conflict all arrived at their erroneous interpretations after the Third Circuit's carefully reasoned decision in *Dunleavy*. There is, therefore, no reason to believe that those three circuits will overrule prior panel

decisions to conform their interpretations to that of the Third Circuit.[1]

2. In spite of the reservations raised by the Solicitor General, this case provides an appropriate vehicle for resolving the acknowledged and important circuit conflict. Notably, the Solicitor General does not suggest that there are any potential obstacles in this case that would *preclude* this Court from deciding the cleanly presented conflict, such as a pleading defect or an issue that must logically be resolved before the Court could reach the question presented. Rather, the Solicitor General raises the possibility that petitioner may not prevail on the merits as a reason to forgo this opportunity to resolve the circuit conflict on the threshold jurisdictional issue. *See* SG Br. 18 (suggesting that "the resolution of the 'public disclosure' issue appears unlikely to affect the ultimate outcome of the case"). The government's concern about the merits is not only speculative, but also irrelevant to the cert-worthiness of the petition.

There is no valid reason to conclude that petitioner cannot prevail on the merits if she surmounts this erroneous jurisdictional bar. The government premises its concern about petitioner's likelihood of success on the merits on the district court's dismissal of some of petitioner's other claims.[2] Although that

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[1] The Solicitor General seems to believe that further percolation on the interpretation of category two might be appropriate in view of the Third Circuit's well-settled interpretation of § 3730(e)(4)(A)'s category one. But that independent issue is not raised in the present petition and is not part of the entrenched circuit conflict currently before this Court.

[2] The government also suggests, inexplicably, that petitioner's claims might also be subject to dismissal on the ground that they were based on information that had been publicly

order is now on appeal in the Ninth Circuit, the Solicitor General posits that the dismissal might augur ill for petitioner's chances of prevailing on remand. That dismissal, with respect to distinct claims, is insufficient evidence from which to draw the powerful inference the Solicitor General seeks to draw. In fact, even the Solicitor General grudgingly recognizes the possibility that "petitioner will prevail on the merits if this Court grants certiorari and holds that the suit can go forward." SG Br. 20. All petitioner seeks is the opportunity to have her day in court, which has been denied to her as a result of the Ninth Circuit's erroneous jurisdictional holding.

More fundamentally, whether petitioner will eventually prevail on the merits is irrelevant to this Court's determination of whether the Ninth Circuit correctly barred petitioner's claims by invoking § 3730(e)(4)(A)'s public disclosure bar. This Court does not — and, indeed, should not — prejudge the merits of the underlying claims in petitions raising jurisdictional issues. To be sure, this Court is generally "unlikely to grant certiorari in a case to announce a rule that *could* not alter the case's disposition." *Halbert v. Michigan*, 545 U.S. 605, 632 (2005) (emphasis added). That prudent restraint, however, is quite different from declining to resolve a clear and important conflict among the circuit courts based on pure speculation about what a lower court might do on the merits on remand. Accordingly, this Court routinely grants certiorari in cases raising important

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disclosed in her earlier lawsuits (*see* SG Br. 19 n.3), even though the Ninth Circuit has already rejected the notion that a public disclosure as to one time period can bar claims arising from a different time period (*see* Pet. App. 4a, 9a), and that issue is not currently before this Court in this case.

issues of federal law where the outcome on remand is uncertain. *See, e.g., Oregon v. Guzek*, 546 U.S. 517, 522 (2006) ("At most, Guzek has shown that state law *might*, not that it *does*, independently give him the right to introduce this evidence. We have made clear that 'a *possible* adequate and independent state ground' for a decision does not 'bar [our] reaching the federal questions' where, as here, a 'State Supreme Court quite clearly rested its [decision] solely on the Federal Constitution.'") (quoting *California v. Ramos*, 463 U.S. 992, 997 n.7 (1983)).

Indeed, basing certiorari decisions on speculations about the merits is particularly problematic in cases challenging the imposition of jurisdictional bars. Because jurisdictional issues are often resolved prior to discovery or other factual development, speculation about the outcome on remand will necessarily entail a high risk of error. In this regard, a petition raising a threshold jurisdictional issue is much like a petition challenging a dismissal for failure to state a claim. The petitioner in such a case, like the petitioner here, seeks the opportunity to present her claims to the lower court. In this posture, it seems particularly unwarranted to deny certiorari based only on speculation about how a lower court will perceive the merits on remand. Not surprisingly, therefore, when presented with an important federal jurisdictional issue requiring its resolution, this Court has granted certiorari in the face of much stronger evidence that the petitioner would not prevail on the merits on remand. *See, e.g., Sisson v. Ruby*, 497 U.S. 358 (1990) (granting review to resolve an important admiralty-jurisdiction issue even though the district court had announced that it "would deny petitioner's petition for limitation even if subject matter jurisdic-

tion existed to entertain th[e] action" (*In re Sisson*, 668 F. Supp. 1196, 1198 (N.D. Ill. 1987))).

In sum, this Court need not consider the underlying merits of petitioner's claims in granting certiorari and resolving the question presented in this case. It needs only to reverse the Ninth Circuit's jurisdictional holding that § 3730(e)(4)(A) bars petitioner's claims — a holding that the Solicitor General emphatically concludes is not only erroneous but also in conflict with the Third Circuit.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 2, 2008

REPLY BRIEF

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(3)

No. 06-1269

FILED
MAY 1 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

UNITED STATES EX REL. CHARLOTTE BLY-MAGEE,
Petitioner,

v.

BRENDA PREMO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondents' attempts to sow confusion with their brief in opposition do not obscure these four basic points supporting a grant of certiorari in this case: (1) an entrenched and current conflict exists among the courts of appeals on the correct interpretation of the False Claims Act ("FCA"), 31 U.S.C. § 3730(e)(4)(A); (2) the issue on which the courts of appeals disagree is of overriding importance to the effective operation of the FCA; (3) the decision below embodies a final resolution of discrete FCA claims based on the application of one of the conflicting interpretations of that provision; and (4) there are no outstanding issues in the case that render it unsuitable for certiorari at this stage. Notwithstanding respondents' efforts at obfuscation, this case presents an excellent vehicle for resolving a deep and abiding disagreement among the circuits on an important issue of federal law.

I. RESPONDENTS' ATTEMPTS TO DISPARAGE THE THIRD CIRCUIT'S *DUNLEAVY* DECISION CANNOT UNDERMINE THE EXISTENCE OF A SQUARE CIRCUIT CONFLICT

A. Respondents recognize (Opp. 3-6) that the decision below conflicts with *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997). But they attempt to dismiss the clear conflict between the Third Circuit's holding and decisions of the Eighth, Ninth, and Eleventh Circuits by suggesting (Opp. 1, 3, 6) that *Dunleavy* is a "decade old" and therefore "dated." That suggestion is baseless. *Dunleavy* is still good law within the Third Circuit. More significantly, the courts of appeals do not consider it dated or irrelevant.

On the contrary, the Ninth Circuit — explicitly acknowledging the *Hays*[1]-*Dunleavy* conflict — analyzed the Third Circuit's reasoning before disagreeing with *Dunleavy* and deepening the existing conflict. *See* Pet. App. 5a-8a. Moreover, the Third Circuit itself does not consider its ruling to be outdated. It has repeatedly and

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[1] *See Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003).

recently reaffirmed *Dunleavy*, demonstrating that the decision not only remains valid but also is firmly embraced by the Third Circuit.

The Third Circuit first reaffirmed *Dunleavy* in *United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*, 186 F.3d 376, 383-84 (3d Cir. 1998) (Alito, J.). Although it is true that neither party directly challenged the established circuit precedent, the *Mistick* court's analysis necessarily assumed the continued validity of the *Dunleavy* rule. The opinion would have been written very differently if the panel had harbored any doubts. Far from distinguishing *Dunleavy*, as respondents claim (Opp. 7), the court cited *Dunleavy* approvingly and restated the prevailing rule: "In *Dunleavy*, we concluded that the term 'administrative' when read with the word 'report' refers only to those administrative reports that originate with the federal government." *Mistick*, 186 F.3d at 383 (internal quotation marks and citation omitted). Moreover, the court's holding — that the product of a request under the *federal* Freedom of Information Act is a report within the meaning of § 3730(e)(4)(A), *see id.* at 383-84 — comports with *Dunleavy*'s holding that only federal administrative materials can trigger the public-disclosure bar.

The Third Circuit reaffirmed its interpretation of § 3730(e)(4)(A) as recently as January 2007, a month after the decision below. Of course, there was still no direct challenge to circuit precedent, but in *United States ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 473 F.3d 506 (3d Cir. 2007), the Third Circuit's analysis again assumed the continued validity of the *Dunleavy* rule. *See, e.g., id.* at 520 n.21 ("a state record cannot serve as a source of publicly disclosed allegations and transactions for purposes of § 3730(e)(4)(A)").[2]

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[2] *Atkinson* held that, although "non-federal administrative reports are not public disclosures" that trigger the public-disclosure bar of § 3730(e)(4)(A), when "there is an independent basis for raising the public disclosure bar, . . . the public nature of the information [such as a state public record] upon which a relator bases his claim . . . is

That very recent decision of the Third Circuit belies respondent's claim (Opp. 9) of a "progressive and ongoing trend" against petitioner's position on the merits. The Third Circuit is squarely in conflict with the Eighth, Ninth, and Eleventh Circuits, and has unquestionably reaffirmed *Dunleavy* in a manner indicating that there is no realistic prospect that the circuits will resolve this conflict on their own.

B. In addition to mistakenly questioning *Dunleavy*'s continued vitality, respondents attempt (Opp. 4-6) to disparage the Third Circuit's reasoning in that case. They characterize the *Dunleavy* decision as a "result driven opinion" rendered "without careful analysis" and "based upon speculative assumptions" that are simply "wrong." Opp. 5-6. Those criticisms completely miss the mark. Whenever this Court resolves an inter-circuit conflict, it is all but inevitable that one of the conflicting positions will be considered "wrong," but that does not mean there is no conflict warranting this Court's resolution.

Furthermore, respondents' principal critique (Opp. 4-5) — that the *Dunleavy* court misinterpreted the phrase "based upon" in § 3730(e)(4)(A) — has nothing to do with the question presented. Even assuming that the court erred in determining whether the suit was "based upon" a public disclosure, that is irrelevant to whether the court properly held that the term "administrative" in the second category of § 3730(e)(4)(A) should be interpreted in light of the federal company that it keeps. Put another way, the petition involves whether there was a "public disclosure" in the first place — not whether the suit was "based upon" that disclosure within the meaning of the statute.

Finally, respondents assert (Opp. 5-6) that *Dunleavy* willfully misinterpreted § 3730(e)(4)(A) because the court did not believe that the report at issue had been

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relevant in determining whether [the relator's] knowledge [of the fraud] is direct and independent" for purposes of the FCA's original-source exception in § 3730(e)(4)(B). 473 F.3d at 523.

sufficiently publicly disclosed. On the contrary, the Third Circuit's decision was based on the unambiguous language of the statute, which makes clear that Congress intended to bar only suits based on federal administrative reports because the term "administrative" appears between two plainly federal modifiers, congressional and GAO. *See Dunleavy*, 123 F.3d at 745.[3]

C. Respondents predict that the Third Circuit will eventually reject the *Dunleavy* rule, and suggest that such predictions somehow justify this Court's ignoring a clear four-circuit conflict on an important matter of statutory construction. *See* Opp. 8-9. But both cases on which they base their prediction — *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991), and *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326 (3d Cir. 2005) — concern the interpretation of a different clause of § 3730(e)(4)(A). They are completely irrelevant to the future development of the conflict implicated in this case.

This case involves § 3730(e)(4)(A)'s *second* category, which bars FCA actions based upon public disclosure of allegations or transactions "in a congressional, administrative, or [GAO] report, hearing, audit, or investigation." In contrast, the first category — at issue in *Stinson* and *Paranich*, and referenced repeatedly by respondents (*see* Opp. 11-12, 16-17) — concerns "allegations or transactions

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[3] Respondents' suggestion (Opp. 13-14) that the statute's reference to the "Government Accounting Office" means an accounting office of *any* government is baseless; no court has adopted it, and it defies common sense. Congress's capitalization of the name makes clear that it meant the federal General Accounting Office (now called the Government Accountability Office), and courts and the compilers of the U.S. Code have had no trouble recognizing that scrivener's error for what it is. *See Mistick*, 186 F.3d at 387 ("Section 3730(e)(4)(A) does not reflect careful drafting or a precise use of language. To begin with a small example, this section refers to the General Accounting Office as the 'Government Accounting Office' and thus misnames an instrumentality that Congress has consistently viewed as its own."); 31 U.S.C. § 3730 n.2 (2000).

in a criminal, civil, or administrative hearing." While respondents unjustifiably conflate the two categories, the Third Circuit has properly recognized that they are entirely distinct. In *Mistick*, for example, the court held that disclosures under category one include *state* civil hearings but also reaffirmed the *Dunleavy* rule that category two includes only *federal* administrative reports. *See* 186 F.3d at 383, 389. That result is consistent with the textual differences between the two clauses: while the first category speaks generally of "a criminal, civil, or administrative hearing," the second category — which is at issue here — explicitly refers to *federal* (congressional and GAO) sources.

Moreover, *Stinson* and *Paranich* both predate *Atkinson*, in which the Third Circuit once again reaffirmed its view that category two includes only federal administrative reports. *See* 473 F.3d at 520 n.21. Thus, the decisions in *Stinson* and *Paranich* concerning category one in no way imply that the Third Circuit might reexamine its established position that the second category of § 3730(e)(4)(A) includes only federal administrative reports.

D. Respondents' omissions are even more telling. They essentially ignore the confusion in the lower courts that further justifies this Court's intervention. *See* Pet. 17-18. Nor do respondents make any mention of the considered position taken by the federal government in supporting the *Dunleavy* rule. *See* Pet. 13. In a brief in the Eighth Circuit, the United States emphasized that the position now taken by the Eighth, Ninth, and Eleventh Circuits is incorrect because it "undermine[s] the balance intended by Congress" between encouraging suits by relators and barring suits based on public disclosures. *See* Brief for the United States of America at 41, *Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003) (Nos. 01-3888 & 01-3891), 2002 WL 32181440 ("*Hays* U.S. Br.").[4] Any further percolation

[4] Because the government addressed that issue as an *amicus curiae*, *see Hays* U.S. Br. at 1 n.1, the Solicitor General was required to approve the filing of the brief. *See* 28 C.F.R. § 0.20(c).

of the issue at this point merely provides a windfall to parties defrauding the United States.

II. THE CONFLICT IN THE COURTS OF APPEALS INVOLVES A MATTER OF FUNDAMENTAL IMPORTANCE TO THE EFFECTIVE OPERATION OF THE FCA

Given the extensive nature of federal-state benefit programs, the question presented is of critical importance in preserving meritorious *qui tam* suits that would otherwise be snuffed out at the jurisdictional stage on the basis of "public disclosures" not known to the federal government. *See* Pet. 23-25. Respondents have no answer, save that, if the problem is serious enough, Congress can fix it. *See* Opp. 12-14. If that argument were valid, this Court would never accept for review a case presenting a question of statutory construction. Because the question presented raises a straightforward issue of statutory interpretation, there is no reason for this Court to abstain from performing its proper judicial role of resolving conflicts among the circuits on questions of statutory interpretation. Nor do respondents point to any pending legislation before Congress — and petitioner is aware of none — that would resolve the conflict and clarify the proper construction of § 3730(e)(4)(A).

With literally tens of billions of dollars flowing from the federal to state governments each year for a wide variety of programs, it is imperative to obtain clarity on whether statements in state administrative reports are the types of "administrative . . . reports" that Congress intended to include in the public disclosure bar. Without such clarity, only certain FCA suits — claims of fraud against the United States uncovered in States outside the Eighth, Ninth, and Eleventh Circuits — will receive a hearing on the merits when the defendant shows that the allegations were previously disclosed in a state administrative report of which the federal government may have been completely unaware. *Cf. Hays* U.S. Br. at 41 ("Many state

and local reports, audits, and investigations . . . never come to the attention of federal authorities[.]").

III. PETITIONER SEEKS REVIEW OF A PART OF THE JUDGMENT THAT IS FINAL

Respondents claim (Opp. 2-3) that the petition should be denied because this case is in an interlocutory posture. But as to the claims at issue in the petition — namely, petitioner's claims of fraud from June 1997 through June 1999 — the case is *not* interlocutory. Rather, the court of appeals *affirmed* the district court's *dismissal* of those claims. *See* Pet. 8 (discussing procedural history). Thus, there will be *no* further proceedings as to those claims.

Respondents' theory seems to be that, because the Ninth Circuit remanded the claims that arose *after* the period covered by the state audit report, this Court should refrain from resolving the clear circuit conflict exacerbated by the court of appeals' affirmance of the final dismissal of the claims at issue in the petition. To be sure, it often makes sense to postpone review of a particular claim until that claim has been finally resolved by the lower courts (although it is not uncommon for this Court to review a claim that a court of appeals has remanded for further proceedings[5]). But that prudential principle has no application here because the claims at issue have been finally resolved.

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[5] *See, e.g., Garcetti v. Ceballos*, 126 S. Ct. 1951, 1956-57 (2006) (granting certiorari after court of appeals reversed district court's grant of summary judgment and remanded for further proceedings); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (granting certiorari after court of appeals reversed district court's dismissal for failure to state a claim and remanded for further proceedings); *United States v. Olson*, 546 U.S. 43, 45 (2005) (granting certiorari after court of appeals reversed dismissal and remanded for further proceedings); *see also* 17 Charles Alan Wright et al., *Federal Practice and Procedure* § 4036, at 36-37 (3d ed. 2007) ("In a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment.").

Moreover, postponing a decision on the issues before this Court will not simplify matters; it can only complicate them. If this Court waits for the district court to resolve the unrelated remanded claims, it would not make the issues here any easier to resolve. The Court would have to undertake precisely the same statutory analysis of whether "administrative" in § 3730(e)(4)(A) encompasses state reports. But postponing review might burden the issues that are now cleanly presented by introducing extraneous issues that could complicate the resolution of the circuit conflict. And, if this Court subsequently reversed the decision below, a second trial on the merits would be necessary. The preservation of judicial resources, in both this Court and the district court, counsels for the immediate resolution of the question presented.

IV. NO ALTERNATIVE GROUND SUPPORTS THE JUDGMENT BELOW

Respondents claim (Opp. 14-15) that this Court's review is unwarranted because an alternative basis supports the Ninth Circuit's decision — namely, that § 3730 bars the case because it is based upon allegations publicly disclosed in one of petitioner's prior suits. Although the allegations in that prior suit covered only a portion of petitioner's current claims (those involving the time period before June 1997, *see* Pet. App. 3a-4a), the district court nevertheless held that they provided a basis for dismissing *all* of petitioner's claims. *See id.* at 17a-18a. But the Ninth Circuit *rejected* that contention. *See id.* at 4a, 9a (refusing to rely on the prior suit to bar claims involving fraud occurring after June 1997).[6] Thus, there is no risk that the Ninth Circuit will reinstate the district court's judgment if this Court grants review and reverses.

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[6] *See also Bly-Magee v. Lungren*, No. 05-55968, 2006 WL 3699494, at *1 (9th Cir. Dec. 13, 2006) (holding that the facts underlying the portion of *Bly-Magee II* that covered October 1992 through June 1997 could not have been publicly disclosed by *Bly-Magee I* because the fraudulent events had not yet taken place).

Moreover, respondents' theory is not properly before this Court because respondents failed to file a cross-petition. It is well-settled that a respondent cannot raise an alternative ground for affirmance when the effect of the Court's adopting that argument would be to invalidate a portion of the judgment on which the petitioner prevailed, regardless of whether the respondent specifically requests that relief. *E.g.*, *Strunk v. United States*, 412 U.S. 434, 435-37 (1973); *see* Robert L. Stern et al., *Supreme Court Practice* 445-46 (8th ed. 2002) (citing cases). Here, accepting respondents' contention that the prior suit bars this entire case would require reversal of the court of appeals' decision to remand for further proceedings petitioner's claims involving fraud occurring after June 1999 (*see* Pet. App. 9a). Thus, because respondents failed to file a cross-petition, their contention is not properly before this Court.

In any event, respondents' theory is incorrect. Respondents assert that, although petitioner's current claims involve false claims that occurred *after* the time period involved in her prior suit, even a "partial disclosure" can bar an entire suit. Nothing in the text of § 3730 supports that counter-intuitive proposition. *Cf. Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397, 1410 (2007) ("'[t]he plaintiff's decision to join all of his or her claims in a single lawsuit . . . should not result in the dismissal of claims that would have otherwise survived'") (quoting *United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 102 (3d Cir. 2000) (Alito, J.)) (first alteration in *Rockwell*). And none of the cases cited by respondents holds that the bar applies when the alleged fraud occurred *after* the time period covered by the public disclosure.[7]

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[7] *See United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 176 (5th Cir. 2004) (nothing indicated that the relator's allegations regarded false claims that occurred after the public disclosure took place through the state-court lawsuit); *United States ex rel. Biddle v. Board of Trustees*, 161 F.3d 533, 535

Finally, respondents contend (Opp. 14-18) that the decision below is correct, but in so doing offer no analysis of why "administrative" should be construed to include state reports, when the references on either side of that word — "congressional" and "[GAO]" — clearly refer to *federal* sources. *See* Pet. 18-22. Although the existence of an entrenched circuit conflict is a sufficient basis for this Court to grant certiorari (and briefing on the merits can proceed after certiorari is granted), it is noteworthy that respondents offer no legal support for the Ninth Circuit's judgment.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

(9th Cir. 1998) (nothing indicated that relator's allegations covered a time period after public disclosure occurred through the news media); *United States ex rel. Fine v. M-K Ferguson Co.*, 99 F.3d 1538, 1546 (10th Cir. 1996) (holding that "based upon" meant "supported by" rather than "derived from"; no allegations of false claims that postdated the public disclosure); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 553-54 (10th Cir. 1992) (public disclosure occurred in three previous lawsuits, congressional hearings, and news reports; nothing indicated that relator alleged false claims occurring after the time period covered by all the public disclosures).

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May 1, 2007

No. 06-1269

In the Supreme Court of the United States

UNITED STATES EX REL. CHARLOTTE BLY-MAGEE, PETITIONER

v.

BRENDA PREMO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an audit performed by a state agency is an "administrative * * * audit" within the meaning of the "public disclosure" provision of the False Claims Act, 31 U.S.C. 3730(e)(4)(A).

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, establishes civil penalties for "[a]ny person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). Suits to collect the civil penalties and statutory damages may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1).

When a *qui tam* suit is brought, the government is given an opportunity to intervene to take over the suit. 31 U.S.C. 3730(b)(2) and (c)(3). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

The FCA's "public disclosure" provision states:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office[1] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4).

2. Petitioner is the former executive director of a nonprofit entity in California that receives federal and state

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[1] Section 3730(e)(4)(A) as enacted refers to the "Government Accounting Office." Both the compilers of the United States Code and the courts have construed that term to refer to the *General* Accounting Office (now renamed the Government Accountability Office). See 31 U.S.C. 3730 n.2 ("So in original. Probably should be 'General.'"); *United States ex rel. Mistick PBT* v. *Housing Auth.*, 186 F.3d 376, 387 (3d Cir. 1999) (Alito, J.), cert. denied, 529 U.S. 1018 (2000).

funds to provide services for disabled persons. She brought this *qui tam* action against individual employees of the California Department of Rehabilitation (CDR), the state agency that administers and distributes federal funds for such services pursuant to the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, and against certain recipients of CDR funding. This is the third *qui tam* suit in which petitioner has alleged that CDR employees conspired with others to obtain, through fraudulent certifications, federal Rehabilitation Act funds for which the CDR was not eligible. Pet. App. 2a, 11a.

a. Petitioner filed the first of those actions (*Bly-Magee I*) in 1992. The United States declined to intervene in the suit. The district court granted summary judgment for the defendants, and petitioner did not appeal. Pet. App. 2a, 14a.

b. Petitioner's second *qui tam* action, filed in 1997, covered conduct occurring from October 1988 to June 1997. *Bly-Magee* v. *Lungren*, 214 Fed. Appx. 642, 643 (9th Cir. 2006) (*Bly-Magee II*). The United States again declined to intervene. Pet. App. 2a. The district court again dismissed the suit. *Bly-Magee II*, 214 Fed. Appx. at 643.

In an unpublished opinion issued contemporaneously with the decision that is the subject of the instant certiorari petition, the court of appeals affirmed the dismissal in *Bly-Magee II*. See 214 Fed. Appx. at 643-644. With respect to the alleged submission of false claims between October 1988 and September 1992, the court held that petitioner's suit was barred by 31 U.S.C. 3730(e)(4)(A). 214 Fed. Appx. at 643. The court explained that "[t]he complaint in *Bly-Magee II* * * * was based on allegations that had been publicly disclosed in" *Bly-Magee I*, and that petitioner had failed to establish that she was an "original source" of the relevant information. *Ibid.* The court further held that peti-

tioner's remaining claims, which alleged the submission of false claims during a period (October 1992-June 1997) that was not covered by the allegations in *Bly-Magee I*, were properly dismissed because petitioner had failed to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b). See 214 Fed. Appx. at 643-644. Petitioner has not sought further review of the court of appeals' affirmance of the dismissal in *Bly-Magee II*.

c. In October 2001, petitioner filed the instant suit (*Bly-Magee III*), which alleges that respondents submitted false claims from fiscal years 1995-1996 through 1999-2000. Pet. App. 3a. The district court dismissed the complaint pursuant to the FCA's "public disclosure" bar, 31 U.S.C. 3730(e)(4)(A). Pet. App. 16a-22a.

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-9a. In disposing of petitioner's claims, the court of appeals divided them into three time periods.

a. The court of appeals first considered petitioner's allegations that respondents had submitted false claims between October 1992 and June 1997, the period covered by the complaint in *Bly-Magee II*. Pet. App. 3a-4a. The court held that this portion of petitioner's current suit was barred by 31 U.S.C. 3730(e)(4)(A) because it was based upon allegations that had been publicly disclosed in *Bly-Magee I* and petitioner had not demonstrated that she was an original source of the information. Pet. App. 3a-4a. Petitioner does not seek further review of that holding.

b. The court of appeals next considered petitioner's claims concerning conduct that allegedly occurred between June 1997 and June 30, 1999. Pet. App. 4a-9a. The court concluded that those claims were based on allegations that had been publicly disclosed in a report issued by the California State Auditor in February 2000. Pet. App. 4a-5a.

The court then addressed the question "whether disclosure in that report issued by a state agency, amounts to a 'public disclosure' for purposes of the False Claims Act." *Id.* at 5a.

The FCA's "public disclosure" provision encompasses public disclosures in, inter alia, a "congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation." 31 U.S.C. 3730(e)(4)(A); see p. 2 & note 1, *supra*. The court noted that other courts of appeals have reached conflicting conclusions on the question whether that language encompasses "an administrative report, audit, or investigation prepared by a state entity (as opposed to the federal government)." Pet. App. 5a. The court noted in particular (*ibid.*) that the Third Circuit has construed the relevant statutory language to be limited to disclosures by federal government sources, see *United States ex rel. Dunleavy* v. *County of Delaware*, 123 F.3d 734, 745 (1997) (*Dunleavy*), whereas the Eighth Circuit has interpreted the same phrase to include state entity disclosures, see *Hays* v. *Hoffman*, 325 F.3d 982, 988, cert. denied, 540 U.S. 877 (2003).

The court of appeals agreed with the Eighth Circuit's ruling in *Hays* and held that the relevant statutory language "includes non-federal reports, audits, and investigations." Pet. App. 6a. The court found that view to be consistent with a literal reading of the statutory language. *Ibid.* The court noted that "[t]he words 'congressional' 'administrative' and 'Government Accounting Office' are separated by commas and the conjunction 'or,'" and it inferred that "each word may be read as a separate modifier for the nouns that follow." *Ibid.*

The court of appeals also stated that its construction of the disputed language in this case was consistent with its prior decision in *A-1 Ambulance Serv., Inc.* v. *California*, 202 F.3d 1238, 1243 (9th Cir.), cert. denied, 529 U.S. 1099

(2000). Pet. App. 6a. The FCA's "public disclosure" provision additionally covers disclosures in "criminal, civil, or administrative hearing[s]," and the court in *A-1 Ambulance* had interpreted that language to cover state and local (as well as federal) administrative hearings. 202 F.3d at 1244. In the instant case, the court of appeals stated that "the statute would seem to be inconsistent if it included state and local administrative hearings as sources of public disclosures and then, in the next breath, excluded state administrative reports as sources." Pet. App. 6a. Finding that petitioner's allegations were "clearly set forth in the State Auditor's report," which covered the CDR's conduct until June 30, 1999, the court concluded that those allegations had been publicly disclosed, and that petitioner had failed to establish that she was an "original source." *Id.* at 8a-9a.

c. The court of appeals reversed the district court's dismissal order with respect to petitioner's allegations that respondents had submitted false claims between June 30, 1999, and June 30, 2000. Pet. App. 9a. The court concluded that this portion of petitioner's complaint was not barred by Section 3730(e)(4)(A) because no allegations concerning that time period had been publicly disclosed. *Ibid.* The court therefore remanded those claims to the district court for further proceedings. *Ibid.*

4. On remand, the district court dismissed the allegations concerning fiscal year 1999-2000 in petitioner's Second Amended Complaint for failure to comply with Rule 9(b). *United States ex rel. Bly-Magee* v. *Premo*, No. CV 01-08716 (C.D. Cal. May 3, 2007), slip op. 4-7. The court explained that petitioner's "allegations involving FY 1999-2000 only restate the general and conclusory allegations she makes for all fiscal years." *Id.* at 6. Granted leave to amend, petitioner then filed her Third Amended Complaint, addressing only the 1999-2000 claims, which the district

court likewise dismissed pursuant to Rule 9(b), also denying further leave to amend. *Bly-Magee, supra* (Aug. 1, 2007), slip op. 4-7. The district court denied reconsideration of that ruling on August 9, 2007. On August 29, 2007, petitioner filed a notice of appeal from the district court's order dismissing her Third Amended Complaint.

DISCUSSION

The court of appeals' construction of 31 U.S.C. 3730(e)(4)(A) is erroneous and conflicts with the Third Circuit's decision in *Dunleavy*. In light of more recent Third Circuit rulings, however, and the likelihood that petitioner's claims would ultimately be rejected on the merits, the better course would be for this Court to await further developments rather than granting review now. The petition for a writ of certiorari therefore should be denied.

A. Section 3730(e)(4)(A) Does Not Encompass Public Disclosures Made In State Administrative Audits

1. Section 3730(e)(4)(A) identifies three categories of "public disclosure[s]" that can trigger the FCA's jurisdictional bar: (1) disclosures in "a criminal, civil, or administrative hearing"; (2) disclosures in "a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation"; and (3) disclosures in "the news media." 31 U.S.C. 3730(e)(4)(A). The certiorari petition presents the question whether the second of those categories (Category 2) encompasses disclosures in state and local reports, hearings, audits, and investigations, or rather is limited to disclosures made in federal government proceedings. More specifically, the issue is whether the February 2000 audit performed by the California State Auditor was an "administrative * * * audit" within the meaning of Section 3730(e)(4)(A).

Contrary to the court of appeals' ruling, Category 2 is properly construed as limited to disclosures made in a *federal* report, hearing, audit, or investigation. "Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones* v. *United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); see *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("doctrine of *noscitur a sociis*" serves "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"). Of course, insofar as Category 2 applies to "congressional" and "[General] Accounting Office" reports, etc., its coverage is unambiguously limited to disclosures made in federal proceedings. It is therefore unlikely "that the drafters of this provision intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character." *Dunleavy*, 123 F.3d at 745.

That interpretation is confirmed by reading paragraph (A) of Section 3730(e)(4) in pari materia with paragraph (B), which defines "original source" for purposes of the public disclosure bar. That definition requires that, in order for the relator to qualify for the "original source" exception to the "public disclosure" bar, the relator must have voluntarily provided the information to "the Government" before filing a *qui tam* action. The most sensible reading of the jurisdictional bar in paragraph (A) is that it covers only public disclosures by the same government as "the Government" referenced in the "original source" exception. And the single, capital G, "Government" referenced in paragraph (B)'s "original source" exception is the *federal* government, as the numerous other references to "the Government" elsewhere in 31 U.S.C. 3730 make clear.

Construing Category 2 (and Category 1, for that matter, see pp. 14-15, *infra*) as limited to federal proceedings is also supported by the purposes and history of the 1986 amendments to the FCA, which added the current "public disclosure" bar. Since its original enactment during the Civil War, the FCA has authorized *qui tam* relators to sue for the United States and for themselves, and to obtain a share of the government's recovery if the suit is successful. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 551-552 (1943) (*Marcus*). Such private actions supplement government enforcement efforts, and thereby deter fraud, by harnessing "the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (*Springfield*) (quoting *United States* v. *Griswold*, 24 F. 361, 366 (D. Or. 1885)).

Congress has repeatedly amended the FCA's *qui tam* provisions in an effort to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Springfield*, 14 F.3d at 649. Early in the FCA's history, "the statute was abused by qui tam suits brought by private plaintiffs who had no independent knowledge of fraud," *Seal 1* v. *Seal A*, 255 F.3d 1154, 1158 (9th Cir. 2001), cert. denied, 535 U.S. 1017 (2002), yet could receive one-half of the proceeds. In *Marcus*, for example, this Court held that the FCA in its then-current form authorized a *qui tam* suit brought by a relator who had derived his allegations of fraud from a prior federal indictment. See 317 U.S. at 545-548.

In 1943, shortly after this Court's decision in *Marcus*, Congress amended the FCA to divest the courts of jurisdiction over *qui tam* suits that were "based on evidence or

information the Government had when the action was brought." 31 U.S.C. 3730(b)(4) (1982).[2] In that context, the unmodified reference to "the Government" unambiguously was limited to the government that could bring the action, *i.e.*, the federal government. Based on its analysis of FCA enforcement practices under that version of the statute, Congress subsequently concluded that the bar to suits based on information already in the federal government's possession had precluded an unduly broad range of potential *qui tam* actions. See *Springfield*, 14 F.3d at 650 ("Congress, in its attempt to evade Scylla, had steered precipitously close to Charybdis.").

In 1986, as one aspect of comprehensive amendments to the FCA, Congress replaced the government-knowledge bar with Section 3730(e)(4). The result was to lift the bar to *qui tam* suits based solely on the fact that the relevant information was already in the federal government's possession, but to maintain the bar to the sort of opportunistic or parasitic suit involved in *Marcus* by prohibiting *qui tam* suits where the federal government itself (or the news media) not only possessed the information but had publicly disclosed it in the course of exposing, investigating, prosecuting, or otherwise pursuing the allegations of fraud. Congress did, however, include an exception to the bar for situations in which the relator was the "original source" of the information that was later publicly disclosed by the federal government, thereby affording protection for the true informer even in the context of such public disclosures.

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[2] Although the Senate version of the 1943 amendments contained an exception to the jurisdictional bar for suits brought by relators who were the "original source" of the government's information, that provision was dropped from the enacted version without explanation. S. Rep. No. 345, 99th Cong., 2d Sess. 12 (1986).

The legislative history of the 1986 amendments confirms that the bar applies only where the public disclosure was by the federal government itself. In the first place, the amendments were directed at modifying the government-knowledge bar, which, through its unmodified reference to "the Government," was clearly directed only to the federal government and its knowledge.

The text of the original bills in both Houses provides further support. The bill reported by the House Judiciary Committee provided that the court was to dismiss any *qui tam* action if it found that the action was "based on specific evidence or specific information *which the Government disclosed* as a basis for allegations made in a prior administrative, civil, or criminal proceeding," or "based on specific information disclosed during the course of a congressional investigation or based on specific public information disseminated by any news media." H.R. Rep. No. 660, 99th Cong., 2d Sess. 42 (1986) (proposed 31 U.S.C. 3730(b)(5)(A)) (emphasis added). The bill contained an exception, however, for situations in which the government took over the action within 60 days, or the government was aware of the information for at least six months before the relator filed suit but did not initiate a civil action within that period. *Id.* at 42-43 (proposed 31 U.S.C. 3730(b)(5)(B)). In this version, all the bill's references to the government clearly meant the *federal* government. The bill passed by the House of Representatives contained that provision. See 132 Cong. Rec. 22,330, 22,331, 22,345 (1986).

The bill reported by the Senate Judiciary Committee contained a parallel, though differently worded provision. It provided that a person could not bring a *qui tam* action "within six months of the disclosure of specific information relating to such allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Govern-

ment Accounting Office report or hearing, or from the news media." S. Rep. No. 345, 99th Cong., 2d Sess. 43 (1986) (proposed 31 U.S.C. 3730(e)(4)). Although the Senate bill was not expressly limited to disclosures by the federal government (in addition to the news media), there is no indication that it was meant to be fundamentally different from the House bill in this respect.

After the Senate bill was reported, the Senate adopted a substitute version of the bill. See 132 Cong. Rec. at 20,530. That provision contained a public disclosure bar that was identical for present purposes to 31 U.S.C. 3730(e)(4) as finally enacted. See 132 Cong. Rec. at 20,531 (proposed 31 U.S.C. 3730(e)(5)). In describing the substitute's *qui tam* provisions, Senator Grassley, the principal sponsor, explained that "the term 'Government' in the definition of original source"—*i.e.*, in that definition's requirement that the relator must have voluntarily informed "the Government" of the allegations prior to suit—"is meant to include any Government source of disclosures cited in subsection (5)(A) [subsection (4)(A) as enacted]; that is, Government includes Congress, the General Accounting Office, any executive or independent agency as well as all other governmental bodies that may have publicly disclosed the allegations." *Id.* at 20,536. This explanation makes clear that paragraphs (A) and (B) in Section 3730(e)(4) are to be read together and that the public disclosure bar in paragraph (A) is triggered only by a disclosure made by a component of the *federal* "Government" referred to in paragraph (B). That interpretation of course is consistent with the express terms of the public disclosure bar in the bill passed by the House.

This interpretation is confirmed by this Court's explanation of the 1986 amendments as expanding the range of *qui tam* actions that may now be brought. See *Cook County* v.

United States ex rel. Chandler, 538 U.S. 119, 133 (2003) (Congress sought in 1986 to make the FCA more effective by, inter alia, "allow[ing] private parties to sue even based on information already in the Government's possession" and by "enhanc[ing] the incentives for relators to bring suit."); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997) (amendments "permitt[ed] actions by an expanded universe of plaintiffs"); S. Rep. No. 345, *supra*, at 4 (stating that the 1986 FCA amendments were "aimed at correcting restrictive interpretations of," inter alia, the statute's "*qui tam* jurisdiction"). Under the court of appeals' interpretation of Section 3730(e)(4)(A), however, the effect of the 1986 amendments is significantly to *expand* not the "universe of plaintiffs," but the reach of the jurisdictional bar, to preclude *qui tam* suits based on information that has never been in the federal government's possession and that is unlikely to come to its attention. The court of appeals' approach would extend the jurisdictional bar to suits that could have proceeded even under the pre-1986 government-knowledge bar—*viz.*, suits in which state, but not federal, authorities knew of the fraud. But there is no question that Congress's concern with the government-knowledge bar was that it excluded too many—not too few—*qui tam* actions.

Against this background, Category 2 in Section 3730(e)(4)(A) is properly construed, consistent with the most natural reading of its text, as limited to federal reports, hearings, audits, and investigations. That interpretation also better serves the "twin goals" (*Springfield*, 14 F.3d at 651) of Section 3730(e)(4)—*i.e.*, precluding *qui tam* actions when the government is already publicly looking into the relevant allegations and can prosecute its own suit, while promoting suits alleging possible fraud that the federal government is not publicly pursuing or may even be

unaware of. While *federal* fraud inquiries and their outcomes are readily available to Department of Justice attorneys, many state and local reports and investigations never come to the attention of federal authorities, and the theoretical availability of such state and local materials in no way suggests that the federal government is already looking into the matter. Barring suits by *qui tam* relators based on disclosures from such state and local sources would therefore frustrate Congress's effort to strike an appropriate balance between encouraging private citizens to expose fraud unknown to or unaddressed by the federal government and preventing parasitic suits by would-be relators who add nothing to the government's store of pertinent information.

2. In *A-1 Ambulance*, the Ninth Circuit held that Category 1 of Section 3730(e)(4)(A), which encompasses public disclosures in a "criminal, civil, or administrative hearing," covers state and local administrative hearings. See 202 F.3d at 1244. In the instant case, the court of appeals relied on that prior holding in construing Category 2 to cover state administrative audits and reports. The court explained that "the statute would seem to be inconsistent if it included state and local administrative hearings as sources of public disclosures and then, in the next breath, excluded state administrative reports as sources." Pet. App. 6a.

In the view of the United States, however, the Ninth Circuit in *A-1 Ambulance* erred in construing Category 1 to encompass state administrative hearings. Rather, consistent with the text, history, and purposes of Section 3730(e)(4) as a whole, the phrase "criminal, civil, or administrative hearing" is properly construed as limited to hearings involving the federal government. If Category 1 is

read in that manner, the purported inconsistency perceived by the court of appeals disappears.[3]

Moreover, as explained above (see p. 8, *supra*), the adjectives "congressional" and "[General] Accounting Office" in Category 2 of Section 3730(e)(4)(A) strongly suggest that the word "administrative" in that same phrase refers to *federal* administrative reports. If (as the court of appeals believed) it would be anomalous to treat one category as encompassing non-federal sources and the other category as excluding them, there is no evident reason to *expand* the coverage of Category 2 simply because Category 1, read in isolation, might appear to cover non-federal hearings. Rather, just as the word "administrative" *within* Category 2 should be construed in light of the accompanying adjectives "congressional" and "[General] Accounting Office," construing Category 1 in light of Category 2's federal focus (not to mention the federal focus of the section as a whole as reinforced by the statutory evolution and legislative history) is consistent with the interpretive canon that a statutory "phrase 'gathers meaning from the words around it.'" *Jones*, 527 U.S. at 389 (quoting *Jarecki*, 367 U.S. at 307).

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[3] The courts of appeals that have addressed the question have all held or assumed that Category 1 encompasses hearings conducted by state and local governments. See, *e.g.*, *United States ex rel. Paranich* v. *Sorgnard*, 396 F.3d 326, 330, 333 (3d Cir. 2005); *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1341, 1350 (4th Cir.), cert. denied, 513 U.S. 928 (1994); *United States ex rel. Reagan* v. *East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 174 (5th Cir. 2004); *United States ex rel. Gilligan* v. *Medtronic, Inc.*, 403 F.3d 386, 390 (6th Cir. 2005), cert. denied, 546 U.S. 1094 (2006); *United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1161 n.6 (10th Cir. 1999).

B. Although A Circuit Conflict Exists On The Question Presented, Review Is Not Warranted In This Case

1. Like the Ninth Circuit in this case, the Eighth and Eleventh Circuits have construed Category 2 in Section 3730(e)(4)(A) to encompass disclosures made in non-federal reports and audits. See *Hays*, 325 F.3d at 989; *Battle* v. *Board of Regents*, 468 F.3d 755, 762 (11th Cir. 2006) (concluding, without meaningful discussion, that a disclosure in a state audit was encompassed by Category 2). The Third Circuit, by contrast, has held that, in Category 2, the term "'administrative' when read with the word 'report' refers only to those administrative reports that originate with the federal government." *Dunleavy*, 123 F.3d at 745. The court in *Dunleavy* found it "hard to believe that the drafters of this provision intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character." *Ibid.* The Third Circuit also explained that state audits and reports often will not come to the attention of federal authorities, *ibid.*, and that "a broad reading of 'administrative reports' would be fundamentally inconsistent with the purpose and tenor of the 1986 [FCA] amendments," *ibid.*

Respondents appear to acknowledge (Br. in Opp. 4-6) that the Ninth Circuit's decision in this case cannot be reconciled with the Third Circuit's analysis in *Dunleavy*. Respondents contend (*id.* at 6-9), however, that subsequent Third Circuit decisions have lessened the force of *Dunleavy*. That overstates matters. Although the Third Circuit in more recent cases has distinguished *Dunleavy* on various grounds, none of those decisions suggests disapproval of the *Dunleavy* court's construction of Category 2.

In *United States ex rel. Mistick PBT* v. *Housing Authority*, 186 F.3d 376, 384 (3d Cir. 1999) (Alito, J.), cert.

denied, 529 U.S. 1018 (2000), the court of appeals held that a federal agency's disclosure of records in response to a Freedom of Information Act (FOIA) request was a "public disclosure" covered by Category 2. The court noted that "[t]his holding is entirely consistent with our holding in *Dunleavy* that a report prepared at the behest of a county was not itself an 'administrative report' because it did not 'originate with the federal government.'" *Id.* at 384 n.5 (quoting *Dunleavy*, 123 F.3d at 745). In *United States ex rel. Paranich* v. *Sorgnard*, 396 F.3d 326 (3d Cir. 2005) (*Paranich*), the court more recently held, based on its prior decisions in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A.* v. *Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991) (*Stinson*), and *Mistick*, that Section 3730(e)(4)(A) encompassed two state-court complaints and a report obtained from the federal government pursuant to FOIA. See *Paranich*, 396 F.3d at 329-330, 333. The court in *Paranich* expressed no disapproval of any aspect of *Dunleavy*'s reasoning, and it was not presented with the specific question whether Category 2 of Section 3730(e)(4)(A) encompasses audits or reports prepared by a state agency.[4]

Most recently, in *United States ex rel. Atkinson* v. *Pennsylvania Shipbuilding Co.*, 473 F.3d 506 (3d Cir. 2007) (*Atkinson*), the court took *Dunleavy* as its starting point in

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[4] The court in *Paranich* did conclude, however, contrary to the view of the United States, that Category 1 of Section 3730(e)(4)(A) encompasses disclosures made in state-court litigation. Given the view of both the United States and the Ninth Circuit that it would be anomalous for Category 1 and Category 2 to have a different reach with respect to non-federal entities, there is some tension between *Paranich* and *Dunleavy*. The *Paranich* decision did not introduce that tension, however. Even before *Dunleavy* was decided, the Third Circuit in *Stinson* had held that Category 1 encompasses state-court disclosures. See *Stinson*, 944 F.2d at 1151, 1157-1160 & n.9; *Dunleavy*, 123 F.3d at 744-746 (distinguishing *Stinson*).

considering whether public documents that do not qualify as "public disclosure[s]" under Section 3730(e)(4)(A) can nevertheless prevent a relator from establishing his status as an "original source" within the meaning of Section 3730(e)(4)(B). The court in *Atkinson* held that a relator whose claim was entirely based on information obtained from his examination of state records that were not "obscure" lacked sufficiently direct and independent knowledge to qualify as an original source. See *id.* at 522-523. As in *Paranich*, the court distinguished rather than disapproved *Dunleavy*, explaining that "[s]imply because a state record cannot serve as a source of publicly disclosed allegations and transactions for purposes of § 3730(e)(4)(A), *Dunleavy*, 123 F.3d at 744-45, does not mean that the public nature of the state records is irrelevant under the direct and independent knowledge language of § 3730(e)(4)(B)." *Id.* at 520 n.21.

Thus, there is a circuit conflict on the specific question presented here. But the Third Circuit—the only court of appeals to limit Category 2 to federal government entities—has itself disagreed with one aspect of the government's position, namely that both Category 1 and Category 2 are limited to disclosures by the federal government. See p. 16 & note 4, *supra* (citing *Stinson* and *Paranich*). In these circumstances, and because the resolution of the "public disclosure" issue appears unlikely to affect the ultimate outcome of this case, see pp. 18-20, *infra*, the better course appears to be to await further development of the issue in the lower courts.

2. On remand from the court of appeals' decision in the instant case, the district court dismissed petitioner's claims concerning fiscal year 1999-2000, explaining that petitioner's allegations did not satisfy Federal Rule of Civil Procedure 9(b) because they "only restate the general and

conclusory allegations [petitioner] makes for all fiscal years." *United States ex rel. Bly-Magee* v. *Premo*, No. CV 01-08716 (C.D. Cal. May 3, 2007), slip op. 6, ; see p. 9, *supra*. That characterization of petitioner's complaint strongly suggests that the district court regarded petitioner's claims concerning the earlier time period (the claims that are presently before this Court) as likewise inadequately particularized. And particularly in light of the Ninth Circuit's decision in *Bly-Magee II*, which held that petitioner's claims as to the October 1992-June 1997 period did not satisfy Rule 9(b) (see 214 Fed. Appx. at 643-644; pp. 3-4, *supra*), there is a substantial likelihood that petitioner's claims for June 1997-June 30, 1999 will ultimately be held to be no different from the claims for the periods that preceded and followed them, and be dismissed as insufficiently particularized even if this Court holds that they are not barred by Section 3730(e)(4).[5]

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[5] Petitioner's claims for the period from June 1997 to June 30, 1999 might also be subject to dismissal on the ground that they were based on information that had been publicly disclosed in *Bly-Magee I* and/or *Bly-Magee II*. The Ninth Circuit concluded, without analysis, that the complaint in *Bly-Magee II* barred only claims arising in the period covered by the allegations in that complaint. See Pet. App. 4a. Accordingly, it held that petitioner could pursue her claims for the period 1999-2000, even though allegations concerning the same basic fraudulent scheme had been publicly disclosed in two prior complaints. Other courts of appeals, by contrast, have found the bar in Section 3730(e)(4) to be applicable even when relators alleged that false claims had been submitted outside the time frames covered by the relevant public disclosures. See, *e.g.*, *United States ex rel. Boothe* v. *Sun Healthcare Group, Inc.*, 496 F.3d 1169, 1173-1174 (10th Cir. 2007) (bar triggered by public disclosure in prior *qui tam* suits of same fraudulent scheme but for different years); *United States ex rel. Settlemire* v. *District of Columbia*, 198 F.3d 913, 918-919 (D.C. Cir. 1999) (disclosure in congressional hearings regarding the manner in which District of Columbia was spending federal funds triggered "public disclosure" bar,

The court of appeals has not addressed the question whether petitioner's allegations concerning the June 1997-June 30, 1999 time period satisfy Rule 9(b)'s particularity requirement. Rather, the Ninth Circuit affirmed the dismissal of those claims solely on the ground that they were barred by Section 3730(e)(4). It is therefore theoretically possible that petitioner will prevail on the merits if this Court grants certiorari and holds that the suit can go forward. Nevertheless, the likelihood that petitioner's claims would ultimately be rejected on other grounds even if the "public disclosure" issue were resolved in her favor reinforces the conclusion that resolution of the question by this Court should await further consideration by the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2007

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even though hearings occurred prior to some misspending alleged in relator's complaint).